

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



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**75-7649**

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**United States Court of Appeals**

For the Second Circuit

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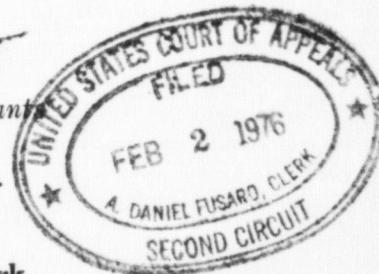
MARVIN STERN,

*Plaintiff-Appellee  
and  
Cross-Appellant,  
against*

SATRA CORPORATION and  
SATRA CONSULTANT CORPORATION,  
*Defendants-Appellants  
and  
Cross-Appellees.*

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Appeal from a Judgment of the United States  
District Court for the Southern District of New York



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**JOINT APPENDIX**

**VOLUME III OF IV**

**Pages 739A to 1113A**

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2 Q Did you ever ask Mr. Stafford if maybe there was  
3 a way we could figure out to get out of this contract with  
4 Dr. Stern? Did you ever ask that?

5 A I did not.

6 Q Do you know if Mr. Giffen had?

7 A I don't believe so.

8 Q Is there anything else that Mr. Stafford put  
9 you straight about at this meeting?

10 A I remember -- I have told you or the Court what  
11 I remember.

12 Q Incidentally, when Mr. Stafford became the  
13 president of Satra Industrial Corporation, was his job to  
14 service IBM?

15 A No.

16 Q Did he correspond and meet with officials of  
17 IBM in connection with the Satra business with IBM?

18 A To a very minimal degree.

19 Q Are you sure of that?

20 A Pardon?

21 Q Are you sure of that?

22 A I'm sure of that, yes. Of course, to the best  
23 of my knowledge.

24 Q Oh, yes.

25 A He had friends there. What he did with his  
friends --

2 MR. HELLERSTEIN: Could you mark this FFFF for  
3 identification.

4 (Plaintiff's Exhibit FFFF was marked for  
5 identification.)

6 Q I show you this exhibit --

7 MR. HILL: Mr. Hellerstein, could you wait just  
8 a second to see if we have ever seen a copy of that?

9 (Pause.)

10 Q I show you Exhibit FFFF for identification. I  
11 ask you if that's a copy of Mr. Stafford's signature, if you  
12 can recognize it?

13 A I would not -- I could not tell you that it is  
14 Mr. Stafford's, but it is our stationery and it does  
15 indicate that it was signed by Mr. Stafford.

16 Q As president of Satra Industrial Corporation?

17 A As president of Satra Industrial Corporation.

18 Q Is he writing to IBM in connection with possible  
19 sales by IBM to Russia?

20 A Yes, he does.

21 Q Is that part of the relationship that Satra had  
22 with IBM in connection with its contract with IBM?

23 A Well, I believe Dr. Stafford is talking of new  
24 opportunity with the Soviet airlines and it certainly was  
25 one of our functions to look for new opportunities.

2 Q He was talking about a large contract that was  
3 possible between IBM and Aeroflot, wasn't he?

4 MR. HILL: Your Honor, I'm going to object to  
5 this. I think it has gone far enough.

6 THE COURT: Are you going to put it into evidence  
7 or not, Mr. Hellerstein?

8 MR. HELLERSTEIN: I am not really interested in  
9 what is said in the document so much --

10 MR. HILL: Could we have the document stricken?  
11 If it isn't being offered for anything, strike it.

12 THE COURT: What are you interested in?

13 MR. HELLERSTEIN: I'm interested in the role  
14 that Mr. Stafford played.

15 THE COURT: Do you want to ask if this  
16 refreshes the witness' recollection as to certain things  
17 Mr. Stafford did; you are allowed to do that.

18 MR. HELLERSTEIN: That's precisely what I am  
19 doing.

20 THE COURT: That isn't precisely what you are  
21 doing.

22 MR. HELLERSTEIN: Inartfully.

23 THE COURT: Well, do it artfully, so the jury  
24 understands.

25 Q Does that document refresh your recollection as

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2 to the role Mr. Stafford played in connection with Satra's  
3 connection with IBM?

4 A I have a fairly good memory of the role that  
5 Dr. Stafford played.

6 Q Was his role to be a liaison between the business  
7 affairs of Satra and the business affairs with IBM insofar  
8 as it concerned possible sales to Russia?

9 A No. If you like I can elaborate on this,  
10 because prior to Mr. Stafford joining us I did call  
11 Mr. Jones to tell him --

12 THE COURT: That is the present of IBM World  
13 Trade?

14 THE WITNESS: That's right, sir.

15 A (Continuing) To say that I understood  
16 Mr. Stafford was now free and we were contemplating having  
17 him join our organization. Then I asked him first of all  
18 would he mind.

19 He had no objection, but he expressed a prefer-  
20 ence. said, as I knew, because I had been told this  
21 before, IBM was very sensitive in having their ex-employees  
22 involve themselves in the relationship between the Soviet  
23 Union and IBM and that he didn't care what Dr. Stafford did,  
24 but he must not act in any capacity that would intervene  
25 between a direct relationship -- in a direct relationship

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2 between the Soviet Union and IBM.

3 Q You mean Mr. Jones told you that as far as he  
4 was concerned he did not want Mr. Stafford to be involved  
5 in the Satra account with IBM?

6 A No, that is not what I said.

7 Q Please --

8 A Mr. Jones was telling me what he told me before,  
9 that IBM still insisted on a direct relationship between  
10 themselves and any given customer, in this case the Soviet  
11 Union. As Mr. Stafford, or any other person who was  
12 familiar with IBM's products and their procedures, he  
13 didn't want it in any way to be construed that they were  
14 now intervening in this relationship.15 THE COURT: Am I to understand, Mr. Oztemel,  
16 that that didn't mean really much more as to Mr. Stafford  
17 than it meant about anybody else; that is, that it meant  
18 that IBM wanted to have a direct relationship with the USSR  
19 and it didn't want anybody to represent them as an inter-  
20 mediary?21 THE WITNESS: That's right, your Honor, but  
22 the concern was -- as we have another gentlemen who years  
23 ago was an IBM employee -- the existence of an ex-IBM  
24 employee or a computer expert immediately --

25 THE COURT: Creates an implication or could?

2 THE WITNESS: That's right, and Mr. Jones was  
3 very sensitive of that.

4 THE COURT: And he wanted to set the record  
5 straight?

6 THE WITNESS: That's right, sir.

7 Q Mr. Oztemel, let me see if I can refresh your  
8 recollection this way.

9 MR. HILL: Just a minute, your Honor. The  
10 witness hasn't testified that he is without a recollection.

11 THE COURT: No, I don't think he has,  
12 Mr. Hellerstein. You can ask him if he gave certain answers  
13 to certain questions, if you believe that what you are about  
14 to read is inconsistent with what the witness has testified.

15 MR. HELLERSTEIN: Yes, I do, your Honor.

16 Q On page 715 of your transcript of your pretrial  
17 deposition taken on August 23, 1972, do you recall having  
18 been asked this question and having given this answer:

19 "Q Is Mr. Stafford to service the IBM account  
20 for Satra?"

21 "A Yes."

22 Do you recall giving that testimony?

23 A Yes.

24 Q Would you like to change your present testimony  
25 in this respect?

2 A No, I don't.

3 Q Let's move on to a different subject.

4 You testified, did you not, that you made an  
5 offer to Dr. Stern when he was terminated. I think you  
6 said something, and you correct me if I'm wrong, like  
7 \$100,000 or a five percent type of ratio.

8 Do you recall having testified substantially  
9 that way?

10 A We are talking of Dr. Stern now?

11 Q Yes.

12 A Yes.

13 Would you ask it to me again, please?

14 Q Do you recall having made him an offer when you  
15 terminated his position as a joint venturer or partner of  
16 yours?

17 A Yes.

18 Q When did you make this offer?

19 A As closely as I can remember, at the same time  
20 when we -- when I told Dr. Stern of what we had found out.

21 Q So it was in the same time as you terminated him?

22 A Well, terminated -- let's say when we had that  
23 discussion. I was not terminating anything.

24 Q You were telling him you considered your agree-  
25. ment -- the document we contend is an agreement, you were

2 telling him that that was no longer effective as far as you  
3 were concerned, did you not?

4 A I was telling him that that part of the agreement  
5 which had to do with his invaluable services was not any  
6 longer there and that I was proposing to compensate him for  
7 the other part.

8 Q It was at that time you made this proposal to  
9 him; is that correct?

10 A As nearly as I can remember.

11 Q Let me show you Exhibit D. Perhaps the jury at  
12 the same time could be given copies of Exhibit D, the  
13 proposal and acceptance.

14 Is this the document that you were no longer  
15 considering as an effective document between you and  
16 Dr. Stern?

17 THE COURT: Up to the point where he said he  
18 didn't consider it effective?

19 MR. HELLERSTEIN: Yes, sir.

20 A I believe the one I am looking at is the offer  
21 giving two alternatives. I believe there is an acceptance  
22 and a following agreement.

23 Q Isn't the document on the top the acceptance?

24 A That's the acceptance.

25 Q So we have the offer and the acceptance, right?

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2 A But I believe another document was drafted after  
3 this.

4 THE COURT: I don't think the record indicates  
5 that any other document was executed.

6 THE WITNESS: Perhaps not. I'm sorry, your  
7 Honor. I withdraw that, yes.

8 Q Is this it?

9 A Yes.

10 Q All right.

11 Tell me, Mr. Oztemel, could you tell the jury  
12 what part of this document, if we could call it that, did  
13 Dr. Stern not perform?

14 A Yes, I think I can tell you.

15 On page 2, paragraph B.

16 Q Is there anything else there that he didn't  
17 perform?

18 A Do you want me to point out where Dr. Stern was  
19 to work for his money?

20 Q Yes, I would like you to tell the jury what part  
21 of the document you complained to Dr. Stern that he didn't  
22 perform.

23 A I was about to tell you, sir.

24 Q Please.

25 A Page 2, paragraph B says that Dr. Stern would

2 have continued to receive commissions as long as he devoted  
3 such time as necessary to service the agreement.

4 Q Is there anything else in the agreement that he  
5 didn't perform?

6 A In this agreement, no, sir.

7 Q That's the whole thing?

8 A It's a very short agreement.

9 Q I realize that. But that's the problem you had?

10 A That was not the problem we had because the  
11 problem we had had to do with many conversations, many dis-  
12 cussions and a meeting of the mind with Dr. Stern, very  
13 little of which was reflected in a hardly put together  
14 agreement.

15 Q Mr. Oztemel, I would like you, as best you can,  
16 to be specific here because we are dealing --

17 A I will try, sir.

18 Q Tell me what aspects of this agreement are the  
19 subject of your complaint with respect to Dr. Stern beyond  
20 this particular point.

21 MR. HILL: I'm sorry --

22 MR. HELLERSTEIN: Beyond this particular point.

23 MR. HILL: I'm sorry. When you are in front of  
24 me, Mr. Hellerstein, I just lose words.

25 A If you will allow me, I would have to clarify as

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2 to my understanding of your terminology, agreement. My  
3 understanding --

4 Q Let's call it a document, all right?

5 A No, because the document was not the agreement.  
6 The document was -- to me, it was a brief form of a much  
7 larger concept that Dr. Stern and ourselves had developed.

8 Q What was this that you have in front of you?

9 A This is a brief document drafted very hurriedly  
10 with the assistance of Dr. Stern and Satra, to be replaced  
11 by the document which reflected all the things that he  
12 understood and we understood.

13 Q You told the jury yesterday, if I recall, and  
14 you correct me if I'm wrong, that this document was prepared  
15 after having long discussions held that same day, arduous  
16 discussions, I think you said in substance.

17 A I didn't say prepared. I said long discussions  
18 and debates, etc., had led to this agreement.

19 Q It was clear to you at that point that Dr. Stern  
20 didn't trust you very much, wasn't it, Mr. Oztemel?

21 A Strangely enough, that was the first time I had  
22 heard, because Dr. Stern did not reflect any such hostile  
23 attitude at the time.

24 Q I am not talking about hostility, I'm talking  
25 about trust. Was it clear to you at the time --

2 A Well, mistrust is rather hostile.

3 Q At this time. How about then?

4 A At any point, sir.

5 Q So you regarded Dr. Stern as not trusting you  
6 very much?

7 A No, quite the contrary.

8 Q Let me understand it so we have it clear. You  
9 thought Dr. Stern trusted you at the time?

10 A I didn't know whether he trusted me, but I knew  
11 that he certainly did not mistrust me.

12 Q You did know that he was insisting that you put  
13 it in writing?

14 A Mr. Hellerstein, from the first day that I met  
15 Dr. Stern, there was always something that he wanted to put  
16 in writing. So I mean one more just didn't make any  
17 difference. It didn't concern me.

18 Q But he never did quite get you to put something  
19 in writing that was firm?

20 MR. HILL: I'm going to object to that. That's  
21 just argument.

22 THE COURT: Overruled.

23 A Quite to the contrary, I think you will find,  
24 as I have seen here, that there were a number of documents  
25 that were put in writing and what we see here are mostly the

formally typed. I assure you that there were perhaps 50 in handwriting which were put into writing which were subsequently just thrown away.

Q Did you say 50?

A I'm guessing, because there were many.

Q Because we asked for the production of every single one and we have in evidence every one that was produced.

A I just told you they were probably discarded by ourselves or by Dr. Stern.

MR. HILL: Your Honor, I think that calls for a response. We have produced everything that we have been able to produce from the files of Satra.

THE COURT: Very good.

MR. HILL: It is unfair.

MR. HELLERSTEIN: I believe that, Mr. Hill.

MR. HILL: I don't think this is the forum for that.

THE COURT: We don't have to have a discussion, because Mr. Oztemel said there were but there are no longer. I gather what is likely to have happened is that somebody wrote something down as a proposal and then it was not necessarily accepted, so it was disposed of.

THE WITNESS: That's right, sir.

2  
3 Q Mr. Oztemel, before this particular document,  
Exhibit D, was there ever another one that you considered  
4 as committing yourself?

5 A Let me understand your question. Before this  
6 document --

7 Q Of August 31 -- September 1.

8 A Were there any others?

9 Q Were there any others that you considered as a  
10 firm commitment of Satra Corporation?

11 A In the sense that they were not signed, I would  
12 have to say no. In the sense that I was ready to sign but  
13 Dr. Stern would not sign for some reason or another, in  
14 that sense, yes.

15 (Continued on page 688.)

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ra  
2 Q The question was, Mr. Oztemel, whether there was  
3 any other one before the one that is before you, that is,  
4 the one dated August 31, the proposal of September 1 and the  
5 acceptance, that you regarded as a firm commitment on the  
6 part of Satra Corporation.

7 THE COURT: You will have to define what you  
8 mean by the word "commitment," because it can mean either  
9 putting one's self in a position in which one is legally  
10 bound or it can simply mean make an offer which is subject  
11 to acceptance. Which do you mean?

12 MR. HELLERSTEIN: I'll try to define my term.

13 Q Before this particular one in front of you,  
14 August 31, was there ever another one that you considered  
15 as binding as far as you were concerned morally or legally  
16 and that Dr. Stern had the right to accept without your  
17 changing it?

18 A I don't know legally, but --

19 Q Let's talk about morally.

20 A Morally, I believe there were some documents  
21 that were drafted which met with my approval but were not  
22 accepted by Dr. Stern and therefore not concluded.

23 Q The only two that we have identified so far are  
24 Plaintiff's Exhibits A and B (handing). Exhibit A is the  
25 one that you identified in your testimony as the one that

2 Dr. Stern typed up after your August 10 meeting, and Exhibit  
3 B is the one that you said could have been your proposal or  
4 his proposal, and it is dated August 25, on your stationery.

5 With respect to those two, Mr. Oztemel --

6 A Yes.

7 Q -- could you consider, either as expressing a  
8 commitment in the sense that Satra Corporation was bound to  
9 it in a moral sense or a legal sense, as you understood it,  
10 giving Dr. Stern the right to accept or reject them?

11 A Of course.

12 Q Which ones? Both?

13 A For instance, at some point in time when  
14 Dr. Stern expressed the interest of becoming an employee of  
15 Satra and I found that not undesirable, I told Dr. Stern  
16 that, "Yes, I'll be happy to have you join Satra organization.  
17 Now, that I considered to be a moral commitment.

18 There was a time when I told him that -- I  
19 don't know the figure now -- that perhaps I would pay him  
20 \$40,000 a year for his services. Had he accepted, I would  
21 consider that a moral commitment.

22 Q How about Exhibit B, which expressed a commitment  
23 for you to pay him \$90,000 a year and had some other  
24 aspects to it? Did you consider that a firm commitment, as  
25 we've been using it, when you signed that, or gave him that?

2 A Yesterday I was asked this and I tried to  
3 remember. I believe that this was a proposal that almost  
4 got to be a reality, but for reasons I don't remember now  
5 it wasn't signed.

6 Q I'm not sure yet we've established it. Do you  
7 remember any particular instance prior to the August 31 -  
8 September 1 instance -- an instance meaning something you  
9 can relate and tell to the jury -- do you remember any  
10 particular instance where you made a firm commitment in  
11 terms of an offer that Dr. Stern could accept or reject?

12 A I just told you, sir, that the one at least that  
13 I remember, I offered Dr. Stern a job at \$40,000 a year.

14 Q Did he accept it?

15 A No, he did not.

16 Q Do you remember any other instance?

17 A No, I don't remember specifically, except that  
18 I do remember there were several.

19 Q But you can't remember any particular one?

20 A Oh, no.

21 Q All right. Let's talk about Exhibit B. Do you  
22 have Exhibit B? It is a proposal of Satra dated August 25.

23 A Yes, I do.

24 Q Do you remember giving that to Dr. Stern?

25 A No, I don't remember giving it to him. I do

2 recognize the type, however. This is our type, I mean, on  
3 our typewriter.

4 Q I think you testified that you didn't recall  
5 whether it was your proposal or Dr. Stern's proposal. But  
6 would you agree, Mr. Oztemel, since it is on your letterhead  
7 and you recognize the typewriting, that it is your proposal?

8 A No, sir.

9 MR. HILL: Objection, your Honor.

10 THE COURT: The answer is no, sir.

11 A (Continuing) I mean, because it is on our  
12 stationery, because it is our typewriter, both of which  
13 Dr. Stern used quite liberally, I wouldn't say that it  
14 makes it our proposal. It could have been.

15 Q This is titled Memorandum of Agreement Between  
16 Dr. Marvin Stern and Satra Corporation. Is it your  
17 testimony that Dr. Stern could have typed this up on Satra  
18 Corporation's letterhead and taken it back for himself?

19 A No. I think he could have very well written  
20 or dictated it to Miss Van Staveren, who probably typed it  
21 up. On the other hand, he probably typed it up himself.

22 Q And possibly you could have had Mr. Mott type  
23 it up?

24 MR. HILL: Again, I just can't hear you,  
25 Mr. Hellerstein.

2 Q And possibly you could have had Mr. Mott type  
3 it up?

4 A I don't know, sir. Another secretary, perhaps.

5 Q It could have been something done at your  
6 direction?

7 A No, not necessarily mine. Also Dr. Stern's  
8 because he was very much at home in our office and --

9 Q I understand you said --

10 THE COURT: The question is whether it could  
11 have been at your direction, not whether it was.

12 THE WITNESS: It could have been. Now, the  
13 only thing I may have to rule out is that it was typed by  
14 Miss Van Staveren, because she would usually put the  
15 initials there.

16 Q So we have established that it was not  
17 Miss Van Staveren's?

18 A That is one safe assumption, yes. And I didn't  
19 type it.

20 Q And you didn't type it?

21 A And I didn't type it, no.

22 Q But it could have been Dr. Stern. It could have  
23 been prepared by someone else in your organization. At this  
24 moment you can't --

25 A Yes.

2 THE COURT: I take it what Mr. Oztemel is saying  
3 is he doesn't know who typed it and therefore, at least as  
4 far as we are all concerned, it could have been anybody  
5 there.

6 MR. HELLERSTEIN: Okay. Let's take it from  
7 there.

8 B2 Q The first paragraph talks about joint best  
9 efforts to consult for and help represent in the USSR  
10 selected U.S. companies.

11 If you recall, Mr. Oztemel, did you and  
12 Dr. Stern discuss IBM in the context of those companies at  
13 that time?

14 A Did we discuss IBM as a member of that group?

15 Q Yes.

16 A We could have. I don't remember.

17 Q You don't recall?

18 A I don't remember.

19 Q Stromberg Carlson?

20 A Stromberg Carlson certainly was discussed, as  
21 IBM was discussed. But whether it was in conjunction with  
22 this one, I couldn't tell you.

23 Q Do you remember any companies that were discussed  
24 in conjunction with that paragraph 1?

25 THE COURT: I was going to point out to

2 Mr. Oztemel that Exhibit B precedes Exhibit C, which is the  
3 one document that is signed.

4 MR. HILL: If your Honor please, his testimony  
5 is that there were discussions going on all throughout this  
6 period.

7 THE COURT: I know what his testimony is,  
8 Mr. Hill. But he said he wasn't sure whether IBM was one  
9 of the companies referred to as among the group specified  
10 in the August 25 memorandum, and I was simply going to point  
11 out to Mr. Oztemel that the August 25 memorandum, Exhibit B,  
12 preceded Exhibit C, which was the so-called agreement, by  
13 only six days.

14 And I ask you, since Exhibit C does refer to IBM  
15 and to Stromberg Carlson, whether that would refresh your  
16 recollection as to whether they were included in the group  
17 referred to in the August 25 memorandum.

18 THE WITNESS: It does not. However, it is logical  
19 to expect that since they were so close that the IBM was in  
20 discussion.

21 THE COURT: All right.

22 BY MR. HELLERSTEIN:

23 Q Do you remember whether you and Dr. Stern had  
24 agreed that the ratio of sharing -- I think that it is  
25 referred to here as proportionment of income therefrom --

2 with respect to Stromberg Carlson and IBM would be 75 percent  
3 to you and 25 percent to him with respect to other terms  
4 mentioned in this document, Exhibit B? Do you remember that?

5 A I don't remember, but I'm reading with you.

6 Q But you are what?

7 A I can follow the document, but I don't  
8 remember the terms you are now telling me.

9 Q Do you remember discussing with Dr. Stern that  
10 you would pay him a fee -- I read from Paragraph 4 of  
11 Exhibit B -- of \$7,500 per month? That is \$90,000 a year.  
12 Do you remember either of those terms being used in respect  
13 to this document?

14 A I have no recollection now, but it is entirely  
15 possible.

16 Q Do you remember, in other words, Mr. Oztemel,  
17 that on or about August 25 you gave a firm proposal to  
18 Dr. Stern that you and he would share in the benefits, in the  
19 revenue from an IBM deal with Russia, on a 75 and 25 percent  
20 ratio and that in addition you would pay him \$90,000 a year?  
21 Do you remember that?

22 A I'm looking at the document, as I told you.

23 Unfortunately, I have no recollection of specific discussions  
24 pertaining to this agreement.

25 Q You testified the other day, if I recall

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2 correctly, that you had a telephone conversation with  
3 Dr. Stern, you being in New York and he being in Los Angeles,  
4 over the weekend, a day or two or three after this document  
5 was set down on paper.

6 A I don't believe I said that. As I recall, and  
7 since yesterday I recall well, I said I had received a  
8 telephone call from Dr. Stern some weekend. He was calling  
9 me to say he was accepting one of the proposals.

10 As I told you, there were many. I didn't know  
11 which one he was accepting. But, as I said, it could have  
12 been this one. I don't know one way or the other.

13 Q I read to you from page 633 of the transcript  
14 and ask if it refreshes your recollection. Mr. Hill asked  
15 you, line 19:

16 "Q Do you recall having a telephone conver-  
17 sation with Dr. Stern on the subject matter of Plaintiff's  
18 Exhibit B?"

19 "A I remember having a telephone conversation  
20 with Dr. Stern. I believe the conversation was over a  
21 weekend, when he called me from California to say that he had  
22 accepted an agreement."

23 A I told you exactly the same thing now, sir.

24 Q So, in other words, it could have been a  
25 different weekend, you don't recall?

2 A It was a weekend.

3 Q And I go on:

4 "Q Now, it could well have been this agree-  
5 ment or it could have been another one. He accepted it.  
6 We changed a lot of agreements, so I cannot tell you."

7 Do you recall which particular agreement we are  
8 talking about? Was it the \$40,000 salary, Mr. Oztemel?

9 THE COURT: Your question is not clear. Are  
10 you asking the witness whether he recalls what agreement  
11 you were talking about at the time of the deposition or now?

12 MR. HELLERSTEIN: No. This is yesterday's  
13 testimony, your Honor.

14 THE COURT: Yesterday?

15 MR. HELLERSTEIN: Yes.

16 MR. HILL: I make the same objection, your Honor.

17 THE COURT: I don't know what your earlier  
18 objection was, but I am inclined to sustain it anyway.

19 Q Let me clarify the question. Does reading this  
20 testimony refresh your recollection as to which agreement  
21 you were referring to yesterday?

22 A No, sir, unfortunately not.

23 THE COURT: Mr. Hellerstein, I'm going to  
24 suggest we have an afternoon recess at this time.

25 (Recess.)

2 BY MR. HELLERSTEIN:

3 Q Towards the end of Mr. Hill's questioning, you  
4 said, and correct me again if I am wrong, in the conver-  
5 sation when you and Dr. Stern came together and you told  
6 Dr. Stern that you no longer could consider that you had an  
7 obligation to him, you said there were two points. One,  
8 you acknowledged he had brought IBM to the deal but you were  
9 disappointed because he would not carry 50 percent of the  
10 load.

11 Is that substantially what you said?

12 A I believe so.

13 Q And was the second reason that you gave which was  
14 the justification for your stating to him that you considered  
15 that your obligations, if any, were at an end, is that  
16 correct?

17 MR. HILL: Objection, your Honor, for all the  
18 same grounds that I expressed before.

19 THE COURT: I think this is referring to the  
20 testimony of Mr. Oztemel on direct examination today just a  
21 short time ago. It is a perfectly fair question.

22 Do you want it repeated to you?

23 THE WITNESS: No, sir. I think I remember it.

24 I don't recall, and I don't believe that I gave  
25 a distinction as to what my reason was to consider that we

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Oztamel-cross

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2 were -- that I believed he had misrepresented. But I  
3 believed, as I said, he had fulfilled a function in one  
4 instance which I recognized, and I wanted him to be compe-  
5 sated for that.

6 The second function, which was also misrepresente  
7 but not fulfilled either, that I didn't feel I wanted to  
8 compensate him for.

9 Q What was that function that he did not perform?

10 A The function that he didn't perform, which was  
11 also misrepresented to me, was first of all, that he had  
12 any services which were so important that without it we  
13 would never have had an agreement with IBM.

14 Q What did he have to do, Mr. Oztamel? That's my  
15 question. What did he have to do?

16 A I can understand your impatience, because I  
17 felt exactly like that for months when, including myself,  
18 a number of my staff tried to get from Dr. Stern what was it  
19 that he was to do.

20 Q You made this agreement with him of August 31.

21 A Yes.

22 (Continued on page 700.)

3Bfol

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PM 3b

1 jgmch

Oztemel-cross

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2 Q Did you ask him what he was going to do?

3 A We certainly did.

4 Q And what did he say to you?

5 A He said we will define all these functions and all  
6 my services. And we had agreed that all these things together  
7 with other definitions would go into the final contract  
8 which we both agreed would eventually be drafted.9 Q What was he supposed to do, as you understand  
10 it?11 A I was as anxious as you are now to find out what  
12 he was to do. All I knew was that he was to do something  
13 which was so essential that without it we would have no  
14 IBM deal.

15 Q You had an IBM deal.

16 A We had an IBM deal with the understanding, at  
17 least on my part and my organization, that Dr. Stern was  
18 with us and he was ready and willing to service the  
19 account at the technical end. As to the definition of  
20 "technical end," as I said, the agreement with Dr. Stern  
21 was to be defined in the final contract.22 Q Is it the fact that you did not have any specific  
23 obligations for him to do? Is that the fact?

24 A That I did not have?

25 MR. HELLERSTEIN: WITHDRAWN.

2 jgmch

Oztemel-cross

2 Q Isn't it the fact that you never called upon him  
3 to do anything specific that he refused to do?

4 A It was hard for me to call on Dr. Stern for  
5 anything specific --

6 Q Answer the question, please, Mr. Oztemel:

7 Did you ever ask Dr. Stern to do something that  
8 he did not do?

9 A Among other things, I asked him to tell me what  
10 he was supposed to do, and that he did not do.

11 Q Did you ask him to do any act, to see any  
12 person, to write any letter, to make any telephone call  
13 that he did not do?

14 A No. Quite the contrary: He even did things I told  
15 him not to do.

16 Q You had no problem about his doing things that  
17 you asked him to do?

18 A I never asked him anything.

19 Q Is it the fact that you did not require any  
20 specific thing on his part?

21 A Please understand that I was not, and I am still  
22 not, the client. The client we were both trying to serve  
23 is IBM. So it is not -- it wasn't my function to ask Dr.  
24 Stern to do things. It was our client's.

25 Q At the time you told Dr. Stern that you did not

1 3 jgmch

Oztemel-cross

2 consider you had any more obligations to him, was there  
3 any performance required of Dr. Stern?

4 A If you will pardon me, I would like to correct  
5 that. I have never told Dr. Stern that I don't owe him  
6 anything. I've always told him that no matter how, ~~no~~  
7 matter through what means, he brought IBM, and that I  
8 recognized that I owed him something. So I was --

9 Q Did you tell him that you would stop making  
10 payments to him under the IBM contract?

11 A Yes.

12 Q You told him that.

13 A Payments to him under the IBM contract, yes, sir.

14 Q You testified a few minutes ago that you offered  
15 to pay him \$100,000.

16 A That's right. That's correct.

17 Q And that's different from what you said before?

18 A No.

19 Q In your opinion?

20 A No.

21 THE COURT: Different from what the contract  
22 might call for, is that what you have in mind?

23 Q You told him that you would not make any more  
24 payments under the contract?

25 THE COURT: Mr. Hill?

4 jgmch

Oztemel-cross

2 A That's right.

3 Q That's your testimony.

4 A That's right.

5 Q I ask you again, was there any performance  
6 required of Dr. Stern at the time you told him this?

7 A I repeat --

8 Q Yes or no, Mr. Oztemel?

9 A On my part?

10 Q Was there any performance required of Dr. Stern  
11 at the time you told him this, that you would make  
12 no more payments under the IBM contract?

13 A By whom?

14 Q By Dr. Stern.

15 A No.

16 Q There was --

17 A Who would have required his services?

18 Q Let me ask you again, Mr. Oztemel:

19 Was there any services required of Dr. Stern  
20 under your agreement with him that he was required to  
21 perform at the time you told him you would make no more  
22 payments to him under the IBM contract?23 A By that time I had found out that there were  
24 none.

25 Q There were no performance obligations on Dr.

1 5 jgmch Oztemel-cross

2 Stern's part; is that your testimony?

3 A No.

4 THE COURT: Let me see if I can make this clear,  
5 because it is a fairly important question and the jury  
6 certainly wants to understand both the question and the  
7 answer.

8 As I understand it, Mr. Hellerstein is trying to  
9 find out this, Mr. Oztemel. At the time that you told  
10 Dr. Stern that you believed that your relationship should  
11 be terminated --

12 THE WITNESS: Yes.

13 THE COURT: -- was there anything pending which  
14 he was obligated to do for Satra which, in your opinion,  
15 he had not done?

16 THE WITNESS: Yes, your Honor.

17 THE COURT: Is that your question?

18 MR. HELLERSTEIN: Yes.

19 Q Will you tell us what it was?

20 A Yes, I will, with pleasure.

21 We had signed a contract with IBM. IBM, at least  
22 on the surface, at least according to figures, especially  
23 according to Dr. Stern's figures, were to pay us, let's  
24 say 3-1/2 percent on \$50 million, which was the minimum that --

25 Q Mr. Oztemel, the question is what he had to do --

1 6 jgmch

Oztemel-cross

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2 A I have to explain it.

3 Q -- not what IBM had to do. What Dr. Stern had  
4 to do.5 THE COURT: Mr. Hill, I see you rise, and I  
6 ordinarily like to let a witness explain in his own way,  
7 but I hope there is a more direct way to answer it.8 Could you first tell us what you think it is that  
9 Dr. Stern had not done? And then, if you wish to explain  
10 why you concluded that, you can amplify.11 THE WITNESS: Your Honor, regrettably I have to  
12 tell counsel that we were looking at the receipt of a  
13 very large commission income. IBM obviously was not making  
14 a gift to us. They expected certain things from us.

15 THE COURT: All right.

16 THE WITNESS: On my part I had understood what I  
17 had to do. But the other part, which was not defined  
18 because of Dr. Stern, was still to be performed. Now,  
19 whatever that was, Dr. Stern did not perform that and that's  
20 what I understand.21 THE COURT: Are you implying that he should have  
22 performed it prior to that time?23 THE WITNESS: Yes, your Honor; if there was indeed  
24 a need for his performance, he should have performed it.

25 THE COURT: But --

1 7 jgmch

Oztemel-cross

2 THE WITNESS: If there wasn't, he shouldn't  
3 have told me that there was.

4 Q Can you answer the question?

5 A I just did.

6 Q Was there anything that Dr. Stern was obligated,  
7 as you understood it, to do --

8 THE COURT: Mr. Hellerstein, I think that Mr.  
9 Oztemel has answered, and you can argue to the jury what  
10 significance you attach to it.

11 Q Mr. Oztemel, were you asked this question in  
12 your deposition on May 4, 1972 at Page 121, and did you  
13 give this answer:

14 "Q Prior to the meeting in late 1971 when you told  
15 Dr. Stern you would not make any further payments under  
16 that agreement, did you prior to that time tell anyone at  
17 Satra that you were unhappy about the performance of  
18 Dr. Stern on behalf of Satra?"

19 "A There was no performance required at the time,  
20 so I couldn't have made such a statement."

21 Do you remember giving that testimony?

22 A Of course.

23 That is very dramatic, but what am I to do? Just  
24 ignore it? All right.

25 Q Were there any technical services that Satra had

1 8 jgmch

Oztemel-cross

2 to perform to IBM?

3 A I think that is a question that you must  
4 necessarily ask Dr. Stern. I didn't negotiate the contract.

5 THE COURT: Is the answer that you don't know?

6 THE WITNESS: I don't know, sir. I'm sorry.

7 Q Were you asked this question on your deposition  
8 on May 18, 1972, Page 593, Line 15, and did you give this  
9 answer:10 "Q Was it your understanding of Satra's obligation  
11 under the IBM contract that it was to provide IBM with  
12 the technical assistance under the letter of the contract?13 "A It is also not clear to me. We were doing a  
14 selling, marketing and financing job for IBM. It was not  
15 to provide them with technical services."

16 Did you give that answer?

17 A Yes, I did.

18 Q Was it truthful?

19 A Of course.

20 Q I show you Exhibit KK for identification  
21 (handing). I ask you to look at the services requested  
22 by IBM to be rendered by Satra as described in Paragraph A  
23 of that agreement of that memorandum on the first page  
24 and as described in Paragraph B of that document on the  
25 first page.

1 9 jgnch

Oztemel-cross

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2 A Yes, sir.

3 Q Which one of those nine services was Dr.  
4 Stern to perform?

5 A None of it.

6 Q This was eight days after he accepted the  
7 document on August 31st, wasn't it?8 THE COURT: Mr. Hellerstein, don't raise your  
9 voice.10 Q This was eight days after that document of  
11 September 1st was performed, wasn't it?

12 A It was.

13 If you are asking me why it was not there, I  
14 will be pleased to tell you.15 Q Your counsel will ask that question if he thinks  
16 it is appropriate.

17 A I shall wait.

18 MR. HELLERSTEIN: I offer Exhibit KK into  
19 evidence.

20 MR. HILL: No objection.

21 THE COURT: All right. It is received in evidence.

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22 (Plaintiff's Exhibit KK for identification was  
23 received in evidence.)24 MR. HELLERSTEIN: May I read the paragraphs I  
25 refer to to the jury, your Honor?

1 10 jgmch

Oztemel-cross

2 THE COURT: Yes.

3 MR. HELLERSTEIN: This is a memorandum by James  
4 Henry Giffen to Dr. Stern. Paragraph A is titled  
5 "Services requested by IBM to be rendered by Satra."

6 "1. Visas and travel.

7 "2. Office facilities in Moscow.

8 "3. Arranging of appointments in Moscow.

9 "4. Market information regarding IBM's  
10 possibiliities in the Soviet market.

11 "5. Advice and lectures on the trade process.

12 "6. Introductions to appropriate government  
13 officials.

14 "7. Advice on protocol.

15 "B. Financial assistance requested by IBM to  
16 be rendered by Satra:17 "1. Influence large purchases of IBM products  
18 through Satra's purchase of Soviet goods.19 "2. Barter, switch transactions, clearing funds  
20 or other unique financial arrangements, advice and  
21 participation when necessary."

22 The memorandum is dated September 9, 1971.

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PM 4a

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Oztemel-cross

2                    Q      I show you Exhibit JJ for identification, a  
3      memorandum from Mr. Hendricks of IBM to Mr. Witham of  
4      IBM.

5                    Mr. Oztemel, you had meetings with IBM --

6                    MR. HILL: Excuse me just one second.

7                    Can I see a copy of that?

8                    Q      Mr. Oztemel, you had meetings with IBM, accompanied  
9      by Dr. Stern; is that correct?

10                  A      Yes.

11                  Q      In those meetings did you tell the officials of  
12     IBM what Satra could do for IBM?

13                  A      Yes.

14                  Q      Is this memorandum on the first page a summary  
15     of the services that you told IBM that you could do for  
16     them?

17                  A      Approximately, yes.

18                  Q      You met with IBM, did you not, on September 3rd;  
19     is that correct?

20                  A      It's possible. I don't recall the exact date,  
21     but it's possible.

22                  Q      You don't deny that?

23                  A      I don't recall it, sir.

24                  Q      Do you have any calendar to help you refresh  
25     your recollection?

2 rgmch

Oztemel-cross

2 A No, I don't have one with me.

3 Q Is there any other service that you told IBM  
4 that Satra could do that is not mentioned in this memorandum?5 A There is a service which we -- "we," meaning  
6 the joint venture of Dr. Stern and Satra, had supposedly  
7 told IBM that would be performed which is not in this  
8 memorandum, yes.9 Q Do you recall if that subject was a subject of  
10 conversation at the meeting of September 3rd?11 A Not specifically, but nevertheless I would have  
12 to say yes to that.13 Q The question is yes or no, Mr. Oztemel, do  
14 \* you remember or do you not remember?

15 A Then I would say yes.

16 Q Who said that?

17 A It was said IBM, referring to the sensitivity  
18 of IBM regarding certain services, that they were very  
19 careful not -- well, let's say among other things not  
20 to put it in a document the type of services which they  
21 were sensitive about.

22 Q Did they say they wouldn't put it into a document?

23 A They did not say it specifically because Dr.  
24 Stern at that moment -- I think the conversation was turned  
25 away from the subject, but it was not, no, there.

1 3 rgmch Oztemel-cross

2 Service was not mentioned.

3 Q Could you please just answer the question, Mr.  
4 Oztemel?

5 THE COURT: He said they didn't say it specifically

6 Q Who said anything about the service that Satra  
7 could perform for IBM that is not mentioned in this memo-  
8 randum?

9 A May I please tell you again that there were  
10 combined services on the part of Dr. Stern and Satra  
11 which we understood was the subject of the contract with  
12 IBM.

13 Q My question to you, Mr. Oztemel --

14 A Yes.

15 Q Let me put it this way:

16 Did you tell anything to the IBM officials  
17 as to a service that Satra could perform for them that is  
18 not mentioned in this document?

19 A I would not, because Dr. Stern had specifically  
20 asked me not to allude or to mention anything that  
21 pertained to his own services which he was to define  
22 some day.

23 Q When did Dr. Stern say that to you?

24 A He said it to me before any meeting; on other  
25 occasions when we were talking about the subject.

1 4 rgmch

Oztemel-cross

2 Q Did he tell you that you should not tell IBM  
3 what Dr. Stern could do for IBM; is that what you are  
4 telling me that he said?

5 A No, that's not what he said, but he said we must  
6 notarize and issue with IBM regarding some services,  
7 technical and otherwise, about which they are sensitive.

8 Q For example, what would they be sensitive about?

9 A Technical services.

10 Q Why would they be sensitive about them?

11 A Because -- obviously, as I said, as closely as  
12 I can define it, there must be some sensitivity in IBM  
13 regarding anti-trust or what-not. I am surmising now, because  
14 I read the papers like I do.

15 Q I will read Page 121 if you want me to refresh  
16 your recollection that there were no technical services  
17 to be performed.

18 A You asked me part of the question and I will have  
19 to give you part of the answer just like it appears there.

20 Q Did you answer there was no performance at the time  
21 on the part of Dr. Stern that was required? Did you answer  
22 that question?

23 MR. HILL: Objection, your Honor. That's  
24 already in the record.

25 THE COURT: Sustained.

2 Q Did Dr. Stern tell IBM . . . your presence at any  
3 time what he could do for IBM?

4 A My presence with IBM --

5 THE COURT: This doesn't require a complex  
6 answer, Mr. Oztemel. It just asks whether you met with  
7 him once or a hundred times, during the time that you met  
8 with Dr. Stern did he ever tell IBM what he was going to  
9 do?

10 THE WITNESS: No, your Honor, although I was  
11 about to say that our meetings were --

12 MR. HELLERSTEIN: I think the question is  
13 answered. He answered no, and that's the answer.

14 MR. HILL: Please, Mr. Hellerstein.

15 THE COURT: Actually Mr. Hellerstein is right  
16 and the answer to Mr. Hellerstein's question is no, he  
17 didn't make any statements.

18 THE WITNESS: That's correct.

19 Q Let's go back to this memorandum of November 8th,  
20 Exhibit JJ, referring to a meeting of September 3rd. Were  
21 there any services that Satra could perform for IBM that  
22 you mentioned at this meeting of September 3rd that is not  
23 mentioned in this memorandum, that you can recall?

24 A Are you asking about services that Satra could  
25 perform or Dr. Stern could perform?

Q I will put the question again, Mr. Oztemel.

Did you tell IBM of any services that Satra would perform for IBM that is not mentioned in this memorandum?

A I told IBM the services that Satra itself was capable of performing.

THE COURT: Those are the ones that are listed?

THE WITNESS: Those are the ones that are listed.

Q Did you or Dr. Stern tell of any services that this joint venture of Stern and Satra could perform, that is not mentioned in this memorandum?

A Not in my presence.

Q That is all I am asking about; in your presence.

A Not in my presence.

Q Did you, or Dr. Stern in your presence, tell IBM at any time of something that Dr. Stern and Satra could do for IBM, that is, anything different from what is said here in this memorandum?

A Dr. Stern had told me that there were such discussions with him and IBM, but not in my presence. That's what I heard from Dr. Stern.

Q So the answer to these questions is that there were no other services that Satra could perform for IBM or that Stern and Satra could perform for IBM except those mentioned in the September 3rd meeting?

2 A I don't know. We told them the services we were  
3 capable of performing. We can stretch our ability and  
4 perform one more service, but this was what we could  
5 do at the time.

6 MR. HELLERSTEIN: I offer the document in  
7 evidence.

8 MR.HILL: No objection, your Honor.

9 THE COURT: Received in evidence.

xxx 10 (Plaintiff's Exhibit JJ for identification  
11 received in evidence.)

12 MR. HELLERSTEIN: This is a memorandum of  
13 September 8, 1971 from Mr. Hendricks of IBM to Mr. Witham  
14 of IBM, subject: Satra Corporation.

15 "On September 3, 1971 Ralph and I talked to  
16 officials of the above company about the services which  
17 they could provide for us.

18 "These consist of two types: General services  
19 that we would require, irrespective of specific orders,  
20 and specific services of a financial nature, similar to  
21 the ones for which a need has been identified in the  
22 Eastern Block countries.

23 "The first type of services comprise the following:

24 "Visas and travel.

25 "Moscow office facilities.

2 "Arrange appointments.

3 "Supply information on need for computers and  
4 foreign expansion availability.

5 "Advice on governmental administrative practices.

6 "Advice on local technical capability.

7 "Introduction to appropriate governmental  
8 officials and advice on protocol."

9 Q On September 3rd or September 8th or September 9th,  
10 or any time around that time, Mr. Oztemel, did you ever  
11 say to Dr. Stern, in words or substance, anything of  
12 the nature of a complaint that he was supposed to do more  
13 than the August 31st agreement required him to do?

14 A No.

15 Q Do you know of anything more that Dr. Stern was  
16 supposed to than you knew at the time?

17 A Yes, sir.

18 Q What?

19 A He should have told me the truth.

20 Q What specifically, Mr. Oztemel? What specifically  
21 did Dr. Stern have to do, as you know it now, that you  
22 did not know on September 3rd?

23 A I told you, Mr. Hellerstein. I believe he should  
24 have told me the truth.

25 Q What, specifically, did he have to do with respect

1 3 rgmch

Oztemel-cross

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2 to IBM that you know now that you did not know then?

3 A I now know that there was nothing he could do  
4 and I now know there was nothing that IBM required of him.  
5 Therefore, he didn't deserve 50 percent.

6 MR. HELLERSTEIN: I move to strike, your Honor.

7 THE COURT: I sustain the objection.

8 You didn't answer the question, what he was  
9 supposed to do for IBM, which was what the question was.

10 A As I know now?

11 Q What difference do you now know as to what Dr.  
12 Stern was supposed to do for IBM than you knew on  
13 September 3rd?14 A I now know that Dr. Stern did not tell me the  
15 truth.

16 MR. HELLERSTEIN: I move to strike, your Honor.

17 THE COURT: I will strike that because that is  
18 for the jury to decide. That is the very request here.19 Let me put it here. I think an admissible  
20 answer would be you now believe that he didn't tell you  
21 the truth whereas at the time you did believe he did  
22 tell the truth.23 MR. HELLERSTEIN: The question, if your Honor  
24 please, is what Dr. Stern was supposed to do for IBM.

25 THE COURT: What I think you have done is you

1 10 rgmch

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2 have gone to a fare-thee-well. I don't think you are  
3 ever going to get an answer, Mr. Hellerstein, and you  
4 can comment on the lack of an answer, if you want.

5 MR. HELLERSTEIN: It may have been that I have  
6 done it to a fare-thee-well, and I don't need an ultimate  
7 permission, but I want an answer to the question if the  
8 question is appropriate in form.

9 MR. HILL: I personally don't understand the  
10 question and I haven't since the first time it was asked.

11 THE COURT: I understand it and I don't know if  
12 it's completely answered, and I don't know if Mr.  
13 Hellerstein's finding that asking it over and over again  
14 will accomplish any more.

15 MR. HELLERSTEIN: I will take your Honor's hint  
16 and move on.

17 MR. HILL: I do except to your Honor's comment  
18 on that with respect to the witness' answer.

19 THE COURT: Let me state that of course it is  
20 for the jury to determine what they think about all of  
21 this question and answer of every witness.

22 Q You testified on direct examination, did you not,  
23 that it was Mr. Watson, the chairman of the board of IBM  
24 that controlled the decision of IBM whether to sell to  
25 Russia or not; is that correct?

1 11 rgmch Oztemel-cross 720

2 A Not as positively as that. I said through  
3 my discussions with executives of IBM I had gotten the  
4 impression that that type of decision was made at Dr. Watson's  
5 level.

6 Q Did you believe that Dr. Stern could control or  
7 influence Mr. Watson's decision-making process?

8 A I didn't care, but that's what Dr. Stern was  
9 telling me, so I believe it, of course.

10 Q But you didn't care?

11 A No, I didn't care how he influenced what.

12 MR. HELLERSTEIN: So we can take that out of  
13 the case, can't we, Mr. Hill?

14 MR. HILL: Are you examining him or me, Mr.  
15 Hellerstein?

16 Q Did you believe at any time that Dr. Stern  
17 could influence IBM's decision as to whether or not IBM  
18 would use Satra as an intermediary in connection with  
19 sales to Russia?

20 A Mr. Hellerstein, I will answer the question this  
21 way: I believed Dr. Stern. That's what Dr. Stern was  
22 telling me and, therefore, I believed that fact, yes.

23 Q So the answer is yes?

24 A Yes, sir.

25 Q Whom at IBM was Dr. Stern to influence in respect

12 rgmch

Oztemel-cross

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to that decision?

3 A My impression was that he was to influence Mr.  
4 Watson.5 Q Did Dr. Stern ever say in your presence that he  
6 knew Mr. Watson? \*

7 A No, but that the Ambassador did intimately.

8 Q You said on direct examination that you didn't  
9 even know that Ambassador Thompson was ambassador to  
10 Russia. Didn't you say that?11 A I said, without the title of Ambassador, I  
12 didn't recognize the name Thompson.13 Q But, nevertheless, your testimony is that  
14 Dr. Stern's mention of Ambassador Thompson persuaded you  
15 that he could influence Mr. Watson's decision to use an  
16 intermediary?

17 A That's what Dr. Stern told me and I believed him.

18 Q Do you know what the decision-making process is  
19 at IBM?

20 THE COURT: Now, or did he know then?

21 MR. HELLERSTEIN: Then.

22 A Precisely, no. I have an idea of the decision  
23 making process in any organization, but that's just general.24 Q Did you have any impression when you were going  
25 to meetings with Dr. Stern whether he knew any of the

2 IBM officials you were meeting or whether he was meeting  
3 them for the first time?

4 A I had no impression one way or the other, but  
5 my general impression was that, no, he didn't know anybody,  
6 that he had no long-standing friendship there.

7 Q He had no long-standing friendships with those  
8 people?

9 A With the people we met in New York City.

10 Q Those were the people that made the decision,  
11 as far as you knew, whether to employ Satra or not, weren't  
12 they?

13 A No, sir. My understanding then, and even now,  
14 is that that type of decision was made at Mr. Watson's  
15 level.

16 Q Do you know for a fact whether or not it was  
17 made at Mr. Watson's level?

18 A As factual -- as close to that as you can come,  
19 yes, sir.

20 Q How do you know it?

21 A By having talked to enough people, including  
22 Mr. Jones.

23 Q Mr. Jones told you that?

24 A Mr. Jones told me that Mr. Watson's opinion in  
25 such matters weighed very heavily in the organization, yes.

1 14 rgmch

Oztemel-cross

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2 Q Did Mr. Jones also tell you that he was favorably  
3 impressed by the fact that Dr. Stern was connected with your  
4 organization and that weighed on the decision to use  
5 Satra?

6 A That he was -- I don't recall.

7 Q Let me read to you from testimony you gave again  
8 on May 18, 1972, at Page 645, and ask if it refreshes  
9 your recollection.

10 MR. HILL: Would you just wait a second?

11 MR. HELLERSTEIN: Sure.

12 (Pause.)

13 Q The testimony begins on that subject on Page 644.  
14 At the bottom of 644, you were asked this:

15 "Q Was anything said about Dr. Stern during that  
16 conversation, referring to a conversation you had with  
17 Mr. Jones earlier in 1972?"

18 You answered:

19 "A Yes."

20 A Would you tell me where it was? Was it a telephone  
21 conversation --

22 MR. HILL: Why don't you show the witness the  
23 testimony?

24 THE COURT: I think it would be better if you  
25 let him read whatever you have in mind.

1 15 rgmch

Oztemel-cross

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2 Q Start at the bottom of 643, Mr. Oztemel,  
3 where you started talking about a conversation you had  
4 with Mr. Jones. I don't think you identified whether --

5 A 643?

6 Q The bottom of 643.

7 A Where it says, "I don't know"?

8 Q Yes. You read it to yourself.

9 A "Do you know whether IBM has ever conducted" --

10 Q Read it to yourself.

11 THE COURT: Read it to yourself so you will  
12 understand it, and Mr. Hellerstein can ask you questions  
13 abou it.

14 Q Let me read to you out loud the question on  
15 Page 644 --

16 THE COURT: Wait a minute. I don't think Mr.  
17 Oztemel is finished reading it.

18 MR. HELLERSTEIN: This is right where he probably  
19 is, your Honor.

20 A Yes, I read it.

21

22

23

24

25

1 fqd Oztemel-cross

2 Let me read to you at page 644, line 13:

5 THE COURT: This year being 1972, you said?

6 MR. HELLERSTEIN: Yes.

7 Q "A I did not say that. You asked me if they  
8 had run any investigations. I remember that in some conver-  
9 sation they had said they checked me out. I had checked  
10 out well together with Dr. Stern and he had checked out  
11 well."

12 Do you remember giving that testimony?

13 A I don't, but I am sure that was true.

15 "Q And this was told to you by Mr. Jones  
16 this year?

17 "A Yes.

19 "A Yes.

22 "A Yes.

23 "Q What?

24 "A He said that Dr. Stern was introduced to  
25 Mr. Jones by the Ambassador. The Ambassador told him that

1 2rgd Oztemel-cross

2 Dr. Stern was an employee of Satra and knowing Dr. Stern's  
3 background they were quite happy that he was an employee of  
4 Satra."

5 Do you remember giving that testimony?

6 A I don't, but I'm sure that that's so.

7 Q Does that refresh your recollection that  
8 Mr. Jones -- incidentally, what position did Mr. Jones  
9 occupy?

10 A At that time I believe it was president of  
11 World Trade.

12 Q He was the highest official, was he not, of the  
13 company of IBM that did business with you?

14 A He was the -- if Chairman was higher, then there  
15 was somebody else, but he was the president of IBM World  
16 Trade.

17 Q He was either the most important person or next  
18 to the most important person in IBM World Trade; is that  
19 correct?

20 A That is right.

21 Q Does that refresh your recollection that  
22 Mr. Jones told you that the connection that you had with  
23 Dr. Stern weighed in favor of the association between IBM  
24 and Satra?

25 A Vaquely. Not entirely, but I'm sure it was.

1 3rgd

Oztemel-cross

2 Q So you will adopt that statement?

3 A I told you that at that time.

4 Q Is it correct, Mr. Oztemel, that you were  
5 anxious to have an association with Dr. Stern because it  
6 would open the door to companies that might otherwise be  
7 closed to you, or not easily accessible?8 A Well, I don't know if I would put it that way.  
9 I was anxious or was happy to have a relationship with  
10 Dr. Stern because listening to his qualifications he filled  
11 in a vacuum in our company which had to do with highly  
12 sophisticated technology.

13 Q Did you in fact use those terms?

14 A I don't recall.

15 Q Let me see if I can refresh your recollection  
16 by reading to you at page 355 of the deposition you gave on  
17 May 8, 1972, line 7:18 "Q Did you expect him, referring to  
19 Dr. Stern, to contribute any introduction or any of his con-  
20 nections?"21 "A Well, that wasn't much of a problem  
22 because as Dr. Stern often enough pointed out, we didn't have  
23 anybody in the company with his level in that field and once  
24 we had somebody like that in our company it naturally opened  
25 the door to people with this kind of orientation."

1 Argd

Oztemel-cross

2 Do you remember giving that testimony?

3 A That's just what I told you again.

4 Q Was it useful to you to have your doors opened  
5 to companies that might not otherwise be accessible to you?

6 A We were very happy to get additional clientele.

7 Q So you welcomed the possibility of associating  
8 Satra with Dr. Stern; is that correct?

9 A Yes, sir.

10 Q Is it also the fact that you were told by IBM  
11 during the course of these discussions and those negotiations  
12 you had with IBM that they were considering another trading  
13 company, a competitor of yours?14 A I heard Dr. Stern testify that. I am not sure.  
15 I heard that. I am not sure I heard that. Perhaps it was  
16 before my joining the meeting, but I have no good recol-  
17 lection.

18 Q Is there a company called Savaretti?

19 A There's a gentleman by that name, yes.

20 Q Is that a trading company?

21 A He has a trading company which is called something  
22 else, yes, sir.23 Q Is it a fact that Mr. Stafford told you that he  
24 was going to consider either your company as an intermediary  
25 or Savaretti as an intermediary?

1 5rgd

Oztemel-cross

12:1

2 A I don't recall, but it would make sense.

3 Q It would make sense?

4 A Yes.

5 Q You had that in mind during the course of the  
6 time that you were discussing a possible deal with Dr. Stern,  
7 wasn't that correct?8 A No. I said it makes sense in the sense that the  
9 company operated by Dr. Savaretti, like ours, is well known  
10 in the field of Soviet trade, so I'm not surprised that they  
11 would consider one or the other.12 Q I refer you to your pretrial testimony at page  
13 369, the testimony you gave at May 8th.14 Q Would you read this paragraph beginning at line  
15 7 and continuing through line 21.

16 A Would you like me to read it out loud?

17 Q Read it to yourself.

18 A Yes, sir.

19 Q Do you now recall that Mr. Stafford told you that  
20 he was considering between your company and Savaretti?21 A No, I don't, Mr. Hellerstein, but if it says it,  
22 it must have been so.23 Q This was a period of time before you had an  
24 agreement with Dr. Stern; is that correct?

25 A I believe so.

1 6rgd

Oztemel-cross

2 Q You testified on direct examination or in answer  
3 to my question -- I think it was direct examination -- that  
4 you instructed your personnel not to go near IBM; is that  
5 correct, or substantially correct?

6 A Those were not my instructions. I instructed  
7 them at Dr. Stern's request not to contact IBM directly  
8 unless absolutely necessary and even then by advising  
9 Dr. Stern.

B2 10 Q Did this instruction extend to Mr. Giffen?

11 A Yes, sir.

12 Q Was this instruction given to you on August 31  
13 or September 1 or around that, the date that you made an  
14 agreement with Dr. Stern?

15 A Was the instruction given to me?

16 Q Was the instruction given by you to the  
17 personnel at Satra and to Mr. Giffen?

18 A I don't recall the date. It may have been the  
19 day before.

20 Q But it was around that time?

21 A It could have been. I don't recall.

22 Q I show you Exhibit MM, the letter of intent by  
23 IBM to Satra Corporation. That's addressed, is it not, to  
24 Mr. Giffen; is that correct?

25 A That is an IBM letter addressed to Mr. Giffen,

1 7rqd

Oztemel-cross

2 yes, sir.

3 Q And do you know that Mr. Giffen was present at  
4 a meeting with Dr. Stern and IBM at around the time this  
5 letter of intent was given?

6 A I am aware that Mr. Giffen was present at one  
7 or two meetings with Dr. Stern, yes.

8 Q Did he defy your instructions?

9 A No. My instructions were for him not to contact  
10 them alone. Specifically for him to be with Dr. Stern  
11 during any meeting. So, no.

12 Q During this period of time of August and  
13 September when Dr. Stern was active in meetings and discus-  
14 sions with IBM, you were also active in meetings and discus-  
15 sions with IBM; is that correct?

16 A I would say seldom, a few times.

17 Q You have already identified the meeting of  
18 September 3; is that correct?

19 A Yes, sir.

20 Q It is a fact that you were involved in at least  
21 one meeting and possibly more in August; is that correct?

22 A I was involved in more than that. I was involved  
23 in more than one, perhaps two or three.

24 Q Do you know how many there were?

25 A No.

1 8rqd Oztemel-cross

2 Q You could have been active in all the meetings;  
3 is that correct?

4 A No. I would say that certainly it couldn't have  
5 been more than four.

6 Q But certainly you have been involved in some of  
7 the meetings?

8 A I was there at some of the meetings, of course.

9 Q And you met Mr. Stafford?

10 A I had met Mr. Stafford, Mr. Hendricks -- I do  
11 not know if it was at that time or about that time I met  
12 Mr. Jones. I had met Mr. Farr. I had met Mr. Witham.

13 Q Who was it in IBM that confused you and  
14 Dr. Stern at one meeting?

15 A Mr. Jones.

16 Q He didn't know which one of the two you were?

17 A No.

18 Q Dr. Stern couldn't have been very influential  
19 with IBM if Mr. Jones couldn't recognize you from him.

20 A I hope that's a compliment, but certainly --

21 THE COURT: It seems to me it's an observation.

22 Q You had an opportunity to ask Mr. Witham,  
23 Mr. Hendricks, Mr. Jones, Mr. Farr and Mr. Stafford how  
24 essential or not Dr. Stern was to the IBM organization, did  
25 you not?

1 aqrd

Oztemel-cross

2 A Mr. Hellerstein, that would be the most  
3 unethical process in our business. When somebody brings you  
4 a customer, anybody, to then go to the same customer that he  
5 brought you and ask the credentials of the finder, that's  
6 unthinkable.

7 Q Is it any more or less ethical to decide that  
8 you will not pay any more money to Dr. Stern on the same  
9 ground?

10 MR. HILL: I object, your Honor.

11 THE COURT: Sustained.

12 Q Whether ethical or unethical, you certainly had  
13 the opportunity to ask them that question; is that correct?

14 A I would say not, because it's unthinkable, as I  
15 said. I would not allow anybody in my company to do anything  
16 like that.

17 Q Let's leave ethics aside for a moment. The  
18 question is whether you had the opportunity to ask him that  
19 question.

20 THE COURT: I think you can argue that,  
21 Mr. Hellerstein. The witness was physically present and  
22 unless he was tongue-tied you could say he was in a situation  
23 where he could do so. Is that right?

24 THE WITNESS: That's right, sir.

25 Q Did you ever ask Mr. Stafford whether Dr. Stern

1 10rqd Oztemel-cross

2 was essential to the contract between Satra and IBM?

3 A I believe you asked me that and I will tell you  
4 the same thing. I would not do that.

5 Q I asked you if you did in fact. Did you do it?  
6 Did you ask him?

7 A No, I would not.

8 THE COURT: You didn't?

9 THE WITNESS: No, sir.

10 Q Take a look again at Exhibit MM.

11 THE COURT: Off the record.

12 (Discussion off the record.)

13 Q Look at the last sentence, "It will also be  
14 terminable at any time by us if Mr. Oztemel should cease to  
15 be actively engaged in your operations."

16 THE COURT: I think we ought to explain to the  
17 jury we are talking about the letter from IBM to Mr. Giffen  
18 about a proposed agreement.

19 Q Did you ask anyone at Satra or did you ask  
20 Dr. Stern or did you ask anyone at IBM why it was that  
21 Dr. Stern's name wasn't mentioned here as giving IBM a  
22 ground to terminate the contract if Dr. Stern should cease  
23 to be actively engaged?

24 A I knew the answer, Mr. Hellerstein.

25 Q What was the answer?

1 11rgd

Oztemel-cross

2 A The answer is that with all modesty, there  
3 aren't too many people, if any, who are as knowledgeable as  
4 I am in this field while there are a few people who know  
5 systems analysis.

6 Q There is nothing unique about what Dr. Stern  
7 could do?

8 A I hoped it was quite unique, but certainly not  
9 irreplaceable. As I said with modesty, I think my position  
10 would have been irreplaceable.

11 Q So the fact is that you really believe that  
12 Dr. Stern was not the sine qua non of the deal with IBM and  
13 Satra, he just helped get the deal for Satra?

14 A No, because that's not what Dr. Stern was  
15 telling me.

16 Q Was he ~~replaceable~~?

17 A I think so, yes.

18 Q You testified on direct examination, if I  
19 remember correctly, and you correct me, that at a certain  
20 time in reference to the Kama River project you told  
21 Dr. Stern that if you would get export licenses you would  
22 pay him a certain sum and if you were not able to get export  
23 licenses you would pay him a lesser sum; is that correct?

24 A No. I think we were more specific than that.  
25 Both Dr. Stern and I knew what we were trying to accomplish.

1 12rgd Oztemel-cross

2 So while generally we referred to export licenses, Dr. Stern  
3 and I knew that we were looking for a specific general  
4 export license permission coming from the White House  
5 directly which in other terms would have given the government--  
6 our government's approval to the Kama River project.

7 Q What was the sum that the -- the upper and lower  
8 sum that you were going to pay Dr. Stern?

9 A I believe the lower sum was \$10,000, which  
10 included the \$5,000 that was already accrued to him, and the  
11 higher sum was \$25,000.

12 Q That higher sum of \$25,000 would be payable if  
13 Satra were able to get export licenses with respect to the  
14 Kama River project?

15 A If Satra -- again I have to qualify that. If  
16 Satra or the Soviet Union got the license to work with the  
17 United States for the totality of the Kama River project.

18 Q In November of 1972 is it a fact that licenses  
19 were issued?

20 A In November?

21 Q Yes.

22 A There came a time when licenses were not issued,  
23 but there came a time when the White House made an announce-  
24 ment that they were in favor of the project.

25 Q Did there come a time when the Commerce Department

1 13rqd Oztemel-cross

2 granted 54 licenses to United States firms to export  
3 \$528,000,000 worth of heavy equipment to the Soviet Union?

4 A Yes, I'm sure that time came.

5 Q Did Satra get some of those export licenses for  
6 its clients?

7 A Satra in the whole matter got partial licenses  
8 and one active license, as I believe I explained during the  
9 deposition.

10 Q But it got some export licenses?

11 A Yes, we got some export licenses.

12 Q Did you pay Dr. Stern \$25,000?

13 A That was not the agreement. The agreement was  
14 not to get some export licenses.

15 Q How much did Satra have to get?

16 A He had to get the White House approval. When I  
17 say he, I don't want to exaggerate, but the White House,  
18 with his help, was to give the approval by a certain date  
19 to allow American companies to engage in the Kama River  
20 project.

21 Q How much in the way of licenses?

22 A How much?

23 Q How much in the way of licenses had to be gotten  
24 before Dr. Stern was to be paid \$25,000 by you?

25 A Well, it's unfair to judge the project by the

1 14rgd Oztemel-cross

2 amount of licenses, but if you want me to --

3 THE COURT: I think, Mr. Oztemel, it's as simple  
4 as this. what was your understanding of the arrangement,  
5 the conditions under which Dr. Stern was to be paid the  
6 \$25,000 and in what respect didn't those conditions come  
7 about?

8 MR. HILL: I think that question, your Honor,  
9 has been answered at least twice, in my recollection, in the  
10 last ten minutes.

11 THE COURT: It has been partly answered, but  
12 Mr. Oztemel named one element as time and named another  
13 element as not just some licenses. He has left that sort  
14 of unclear in my mind.

15 THE WITNESS: I would be glad to clarify it for  
16 you, your Honor.

17 The licenses, as we were instructed to apply for  
18 them by the Department of Commerce, or the license, was  
19 a symbolic one. It did not specify either specific numbers  
20 of dollars or precise machinery. It had to have some  
21 numbers, but the license was a symbolic license asking for  
22 the totality of the project. Now, the totality of the  
23 project was estimated to be something like \$3,000,000,000,  
24 but this is not what we were asking Dr. Stern to do.

25 Q You said you made a proposal to Dr. Stern that

1 15rgd Oztemel-cross

2 if export licenses in a certain amount that you now say were  
3 issued, Dr. Stern would be paid \$25,000?

4 A No, Mr. Hellerstein. I told you that we had a  
5 very clear understanding that we were trying to get the  
6 White House approval to allow American companies in totality  
7 to enter the Kama River project.

8 THE COURT: Were you doing that for American  
9 companies at large or just for Mack?

10 THE WITNESS: Mack again was the representative  
11 of all American companies because it was unpractical for  
12 thousands of companies to apply.

13 THE COURT: So to the extent Satra represented  
14 Mack, Satra represented all of these companies?

15 THE WITNESS: That's right.

16 Q How much in the way of licenses did you have to  
17 get before you were going to pay Dr. Stern \$25,000?

18 A It had to be the totality of the licenses that  
19 Mack Truck had applied for.

20 Q All of them?

21 A All of them.

22 Q How much in fact did Satra's clients get in the  
23 wav of export licenses, over a billion dollars?

24 A No, sir. No, sir. Our clients at the time --  
25 only one of the clients, Swindell Dressler got the license

1 16rqd

Oztemel-cross

2 for perhaps \$16,000,000, something like that.

3 Q 16,000,000?

4 A I believe so. I'm not sure.

5 Q That wasn't in your mind a sufficient enough  
6 amount to pay Dr. Stern \$25,000?7 A It had nothing to do with the amount, as I told  
8 you, Mr. Hellerstein.9 Q Did you give out this interview on or about  
10 November 19, 1971, Mr. Oztemel, as reported in Newsweek?

11 MR. HILL: Do we have an exhibit or something?

12 MR. HELLERSTEIN: I should mark it, you are  
13 right.

14 MR. HILL: Does it have a number?

15 MR. HELLERSTEIN: I'm going to give it one.

16 MR. HILL: Isn't it marked?

17 MR. HELLERSTEIN: No.

18 MR. HILL: I thought we premarked all the  
19 exhibits in this case.

20 THE COURT: Well, apparently we didn't.

21 MR. HELLERSTEIN: GGGG for identification.

22 MR. HILL: Is it possible to get a copy of this  
23 document?

24 MR. HELLERSTEIN: We will read it together.

25 THE COURT: You can get in touch with Newsweek.

1 al6rad

Oztemel-cross

2 MR. HILL: I don't think I have time, your  
3 Honor.

4 (Pause.)

5 (Continued on next page.)

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PM 5

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Oztemel-cross

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2 THE COURT: The fact that is is marked quadruple  
3 G doesn't mean we are going to have to fill in between MM  
4 and GGGG, does it?

5 MR. HELLERSTEIN: No, sir, your Honor.

6 Q Did you give this interview, Mr. Ostemel? And  
7 I will read from the report:

8 "Ara Oztemel's section manager said his firm is  
9 an American trading firm" --

10 MR. HILL: I don't really like to be captious  
11 about it, but if he likes to offer it, let him offer it,  
12 but it isn't in evidence.

13 MR. HELLERSTEIN: I'll offer it.

14 THE COURT: Why don't you ask him to look at it  
15 and say whether or not he gave that interview? If he  
16 did, you can put it in evidence.

17 Q Look at the last paragraph and say if you gave  
18 that interview in substantially the substance used.

19 THE COURT: I have known some newspaper men to  
20 quote people inaccurately.

21 Pause.)

22 A I don't recall, Mr. Hellerstein. But I doubt  
23 that I would have called myself a Satra manager.

24 Q Let's look at the numbers here. First, "a  
25 license is being issued involving equipment and technical

1 2 jgmch

Oztemel-cross

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2 data for the \$1,400,000,000 Kama River truck plant."

3 And then it goes on to say --

4 THE COURT: Wait a minute, Mr. Hellerstein.

5 This is the very problem Mr. Hill is trying to avoid,  
6 reading a document not in evidence.7 If you are trying to bring out some information  
8 in there, why don't you ask him whether it refreshes his  
9 recollection as to the point you are trying to make?10 Q Does it refresh your recollection that your  
11 clients got approximately a half-billion dollars at least  
12 of export licenses?

13 A No, sir.

14 Q Does it refresh your recollection as to any  
15 amount of export licenses that your clients obtained?16 A I told you that our clients got a total of maybe  
17 16 million and I believe they got it in their own name and  
18 not our application.19 MR. HILL: Your Honor, I am going to object to  
20 any further reference to this document because this is just  
21 the problem with this kind of a document. Nobody knows  
22 who wrote it, and there is nobody here to identify it.  
23 And indeed I think Mr. Hellerstein --

24 THE COURT: I will instruct the jury --

25 MR. HILL: There is more to it than that.

2 THE COURT: Let me instruct the jury, anyway,  
3 that merely asking a question on the basis of a document  
4 that Mr. Hellerstein has does not --

5 MR. HILL: Your Honor, may I just go on with the  
6 one for just one brief second?

7 It is a fact that produced with this document  
8 in the IBM files, as Mr. Fisher has identified, is a covering  
9 memorandum which I think, in fairness, in view of Mr.  
10 Hellerstein's use of this document, which I consider --

11 THE COURT: Mr. Hill, let me stop you --

12 MR.HILL: -- inappropriate, that he be compelled  
13 to read the first paragraph of the memorandum.

14 THE COURT: I won't compell him to read that.  
15 I will tell the jury what I understand the law to be with  
16 regard to the treatment of matters of this kind, namely,  
17 that any document can be put before a witness, regardless  
18 of whether it is a part of the document or a full document,  
19 and to be asked whether that refreshes his recollection  
20 or not. It does or it doesn't.

21 In this case it did not refresh Mr. Oztemel's  
22 recollection and, therefore, you are to disregard any of  
23 the information which was put into the question.

24 MR. HILL: But, your Honor, I do think with all  
25 due respect to the Court, that he is also entitled to see

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2 the whole document, that's all.

3 THE COURT: You can show it to him on redirect,  
4 if you want to or if you believe it will help to refresh  
5 his recollection.6 MR. HILL: I will be seated, your Honor, with only  
7 my objection. I consider this an improper cross.8 THE COURT: Is it your suggestion that seeing  
9 the remainder of the document might refresh Mr. Oztemel's  
10 recollection?11 MR. HILL: Yes, your Honor, it certainly would,  
12 in my judgment.

13 THE COURT: I am not going to --

14 MR. HILL: May I show it to your Honor?

15 THE COURT: No. You can show it to Mr. Hellerstein.  
16 If he wants to refresh the witness' recollection and he  
17 thinks it will be effective to do so, he can go ahead on  
18 it.

19 And, of course, you are free to use it on redirect.

20 Q Here is the memorandum that covers it (handing).

21 THE COURT: All right. Just let him see if it  
22 refreshes his recollection, and don't read it to him.

23 (Pause.)

24 A Yes.

25 THE COURT: Does that refresh your recollection,

2 I guess the question would be, as to the amount of licenses  
3 secured by your clients?

4 THE WITNESS: Your Honor, this refreshes my  
5 recollection to the extent that that statement was not  
6 made either by myself or any staff member of Satra.

7 THE COURT: That which statement was not made?  
8 The statement that is allegedly from the magazine?

9 THE WITNESS: That's right.

10 THE COURT: But does it refresh your recollection  
11 as to the amount of licenses received by your clients?

12 THE WITNESS: I find the amounts totally  
13 incorrect and not coinciding with any amounts I know on the  
14 part of our clients.

15 Q Let me ask you this: There are some companies  
16 listed here. I won't read the names, but there are one,  
17 two, three, four --

18 MR. HILL: Your Honor, again I must object to  
19 this.

20 THE COURT: Don't refer to what is there. Just  
21 let him read it and ask him if it refreshes his recollection  
22 about whatever question you want to ask.

23 Q Which of these companies in this third paragraph  
24 here were your clients in connection with the Kama River  
25 project?

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2 THE COURT: If any.

3 (Witness indicating.)

4 Q Just IBM?

5 A No, no. Swindell-Dressler Division of Pullman,  
6 Inc.

7 Q No others?

8 A As applied to Kama, no others.

9 Q And does this refresh your recollection as to  
10 how much in the way of export licenses you received for  
11 that company, or that company received?12 MR. HILL: Your Honor, the witness has testified  
13 as to Swindell-Dressler. I don't think it is fair to  
14 ask him if it refreshes his recollection.15 THE COURT: It is fair to ask him, in my opinion,  
16 but enough is enough.

17 Let's go on.

18 Q How much?

19 A I believe it was 16 million, but I'm not sure.

20 Q One-six or six-oh?

21 A One-six.

22 Q And apart from the export licenses issued --

23 A Would you excuse me? I would like to clarify this  
24 thing in your mind. This was not a license for which we  
25 had applied. This was a license which Swindell-Dressler

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2 had applied long before they became our client, and they  
3 received it.

4 None of that, you see, is among the group that  
5 we had applied for.

6 Q Did you ever disclose to Dr. Stern exactly how  
7 much in the way of export licenses you received for your  
8 clients, or your clients received in connection with this  
9 Kama River Project?

10 A No, sir.

11 Q In your opinion, Mr. Oztemel, does Dr. Stern have  
12 an entitlement to the \$25,000 that you promised him if  
13 export licenses in some amount were to issue?

14 A In no way.

15 Q At the time you told Dr. Stern that he would  
16 receive \$25,000 if, and I quote you your testimony here  
17 yesterday, "we are fortunate enough to be successful with  
18 these export licenses" --

19 MR. HILL: I'm sorry. I just can't hear you.

20 I'm sorry.

21 Q I will put the question again.

22 At the time you told Dr. Stern that you would  
23 pay him \$25,000 if you were fortunate enough to be success-  
24 ful in respect of these export licenses, did you have an  
25 idea as to how you could define "success"?

2 A Yes. Very precisely.

3 Q Please define it for the jury as you understood  
4 it then.

5 A We had to receive a symbolic group of licenses  
6 for their approval before a certain date which would have  
7 made our protocol or agreement between the Russians, Mack  
8 Truck and ourselves operative. If the licenses were not  
9 received during that date, the protocol was cancelled  
10 and the whole project was abandoned as far as we were  
11 concerned.

12 Q Did you continue to represent companies that were  
13 associated with Mack Truck in that venture?

14 A Associated with Mack Truck? No, sir.

15 Q Is Swindell-Dressler associated with Mack Truck?

16 A We did not continue to represent them.

17 Q Did you continue to represent any companies with  
18 respect to the Kama River project?

19 A We represented and still do represent companies  
20 that conceivably can some day have a part in Kama River.  
21 I can tell you precisely that we do not have a client at  
22 the moment, or never had any other than Swindell -- who  
23 has been fortunate enough to get a part of the Kama River  
24 project.

25 Q When you made this promise to Dr. Stern that we

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2 are talking about, did you tell him what your definition  
3 of symbolic would be?

4 A Yes. I didn't have to tell him. He was in the  
5 middle of things and often he told me.

6 THE COURT: Would you tell me what "symbolic"  
7 means? I don't understand it.

8 THE WITNESS: You see, your Honor, the concept  
9 of doing this huge business with the Soviet Union was not  
10 decided. The Commerce Department said that this was not  
11 their decision and now the decision vested with the White  
12 House.

13 THE COURT: Right.

14 THE WITNESS: Nevertheless, there had to be an  
15 application on which the White House could have acted.

16 THE COURT: Of course.

17 THE WITNESS: So that documentation with the  
18 decision and cooperation of the White House and the  
19 Department of Commerce was incorporated in a single  
20 license which symbolically took some part of Kama, and  
21 applied, the result or the expectancy being that if that  
22 was approved --

23 THE COURT: It was symbolic in the sense that it  
24 was sort of a test case?

25 THE WITNESS: Test case, yes.

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2 THE COURT: All right. Thank you.

3 Q When you had this conversation with Dr. Stern,  
4 it was a fact, was it not, that he had already earned  
5 \$5,000?

6 THE COURT: Had already?

7 MR. HELLERSTEIN: Earned, yes, sir.

8 A Yes, having worked two weeks, yes.

9 Q His rate was \$500 a day, was it not?

10 A I don't know what his rate is, Mr. Hellerstein.  
11 we never quite found ourselves being able to afford that.  
12 But we had agreed to \$5,000 for two weeks.13 Q Did you testify yesterday, at Page 620, that you  
14 knew at the time, or you understood at the time, that his  
15 rate was running at \$500 a day?16 A I believe I said that Mr. Giffen came to me and  
17 expressed concern that the two weeks having been decided  
18 for \$5,000, that Dr. Stern would then expect that from then  
19 on each day would run at the rate of \$500.20 Q So, the answer is you knew that his rate was  
21 \$500 a day?

22 A No, sir.

23 THE COURT: He knew the mathematics of that  
24 situation.

25 MR. HELLERSTEIN: All right.

2 Q He had worked for the requisite number of days  
3 and was entitled to that \$5,000, was he not?

4 A Yes.

5 Q And this was in May of 1971?

6 A Probably so.

7 Q When was the first time that Dr. Stern was paid  
8 anything with respect to his consultation on Kama River?

9 A I think probably on an agreed upon date, the  
10 termination, successfully or unsuccessfully, of the  
11 period.

12 Q Do you remember the date?

13 A I heard in the testimony that he was paid in  
14 August.

15 Q And he was entitled to it in May?

16 MR. HILL: Sorry?

17 Q He was entitled to it in May?

18 A I didn't say that.

19 Q Was he entitled to it in May?

20 A He was entitled if he wanted to take his  
21 \$5,000 and go home, but he wanted to stay and work more and  
22 perhaps earn \$25,000.

23 Q Are you telling the jury that when Dr. Stern  
24 earned \$5,000 that in order for him to get that \$5,000  
25 he had to work some more?

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2 A No. He did not have to, but he chose to.

3 Q Did he ask for the \$5,000 at the end of the two  
4 weeks?5 A Not from me and he wouldn't have asked me anyway.  
6 He may have asked our accountant.

7 Q Did he ask anyone at Satra?

8 A I wouldn't know.

9 Q Didn't you testify yesterday that there came a  
10 time shortly after this two-week period when he came and  
11 asked for the money?

12 A I don't believe so.

13 THE COURT: Mr. Hellerstein, I take it you are  
14 not finished.

15 MR. HELLERSTEIN: That is true, your Honor.

16 THE COURT: And under the circumstances, I am  
17 going to terminate our session for today. If I thought  
18 you would finish in five or ten minutes, I would be glad  
19 to go along.20 Ladies and gentlemen, I am sorry we were not  
21 able to conclude the case. It is nobody's responsibility.  
22 But we will, therefore, have to continue on Monday, and  
23 I will see you Monday at 10:00 o'clock and I hope you  
24 all have a good week end.

25 (The jury left the courtroom.)

2 (In the robing room.)

3 THE COURT: I understand that counsel have agreed  
4 as to what the issues are relating to damages, but not as  
5 to the procedure by which those issues are to be determined.  
6 Do you wish to indicate what your understanding is, Mr.  
7 Hellerstein?

8 MR. HELLERSTEIN: Mr. Hill thinks that there are  
9 fact issues to be developed. We disagree.

10 Our position is this: We believe that there  
11 are precise issues on this which we have tabulated and  
12 charted. Mr. Hill has a copy of this (handing).

13 MR. HILL: Which I haven't yet read, your Honor.  
14 I got it sometime during the course of the afternoon.

15 MR. HELLERSTEIN: I misdelivered it this  
16 morning.

17 This chart that I have just given to your Honor  
18 we think is suitable either to presentation to a jury or  
19 is suitable for use however the Court sees fit if this  
20 issue should be tried by the Court.

21 We believe that these issues all ought to be  
22 tried at this same time, or if there is any separate hearing  
23 involved, it would be a separate hearing that follows  
24 very quickly after the trial and is conducted by the Court  
25 and not by a magistrate.

2 THE COURT: I can't do that. I can be perfectly  
3 frank. I just can't conduct another separate trial right  
4 after it. So I think we had better put everything to the  
5 jury.

6 MR. HILL: We object to it, your Honor.

7 THE COURT: I am going to have to figure out  
8 whether there are fact questions here or not. If there  
9 are any fact questions, they are going to the jury. If  
10 there are no fact questions, I will decide them as a matter  
11 of law.

12 MR. HILL: The pleadings in this case, your  
13 Honor, involve a declaratory judgment. The pleadings  
14 expressly state, and the plaintiff's complaint says, that  
15 you can't determine damages in this case.

16 THE COURT: The complaint says you can't determine  
17 damages?

18 MR. HILL: Yes, it says that.

19 THE COURT: Would you show it to me?

20 MR. HILL: If I can just go on, because at least  
21 to me, anyway, it seems that wholly apart from the  
22 pleadings, one of the real issues on the damage question  
23 here is the relationship between the '71 and the '73  
24 contract.

25 Now, your Honor will recall that there is no

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2 proof in this case, other than the document itself, with  
3 respect to the '73 contract.

4 Now, if we get into a question, it seems to me,  
5 of whether or not the '73 contract is a renewal and  
6 what the terms -- the words, if you like -- mean in the  
7 '73 contract, does, for example, the word "retainer" mean  
8 the same thing in the '73 contract that it means in the  
9 '71 contract, that is a question of fact, as indeed --

10 THE COURT: I agree with you.

11 MR. HILL: Okay.

12 As is the question of whether it was intended to  
13 be a renewal.

14 Now, one of the places that we would have to  
15 elicit testimony if that issue were in the case would be  
16 from the IBM people who were involved in the negotiation  
17 of the '73 contract.

18 THE COURT: Sooner or later we have to face that,  
19 don't we?

20 MR. HILL: Yes, your Honor. I understand that.

21 But what I'm saying is that it cannot be in this proceeding.

22 THE COURT: Why not?

23 MR. HILL: Because we have had no discovery of  
24 the IBM people; it was not in the case. Indeed, this  
25 motion to add references to the '73 contract was made in

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2 this case.

3 THE COURT: That may be another question and then  
4 we may have to have another jury for that remaining  
5 material.

6 MR. HILL: That's our point, your Honor. Our  
7 point is we are perfectly prepared to put to your Honor  
8 the question of damages.

9 THE COURT: I will say this, Mr. Hellerstein:  
10 While I have granted your motion to add the 1973 agreement  
11 to the material, I do think that if the issues that it  
12 raises will require testimony from people as to whom it  
13 is not unreasonable that discovery has not yet occurred,  
14 I don't see how we can try it the day after this is over.

15 MR. HILL: That's all I meant, your Honor, when  
16 I said damages weren't in this case if what were meant  
17 were the global damages, and when I say "in this case"  
18 I mean in this particular proceeding with this particular  
19 jury. That's all I meant to say.

20 MR. HELLERSTEIN: If your Honor please, in respect  
21 to that issue, we made a motion -- there are two answers  
22 I want to give.

23 The first has to do with the timing before trial  
24 when all these issues rcolated, going back to last  
25 summer.

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2 The second has to do with the inadmissibility  
3 for legal reasons of the type of testimony Mr. Hill is  
4 talking about.

5 Addressing myself to the first question, last  
6 summer, when we first got --

7 THE COURT: Let me interrupt, please. I am  
8 afraid I am a little tired and maybe a little short-  
9 tempered at the end of a week, but I'm not talking about  
10 theories and concepts and everything else. I am trying,  
11 as a practical matter, to figure out how the hell I am  
12 going to decide these issues which you gentlemen have.

13 I'll hear what you have to say and try to think  
14 it through over the week end, but it seems to me that  
15 it is quite possible that some testimony may be necessary,  
16 either before me, and it doesn't really make much  
17 difference whether it is before me or a jury, in relation  
18 to the 1973 contract and what it means in relation to the  
19 earlier contract. I believe I said at the time I granted  
20 your motion that it seems to me that at the least you were  
21 entitled to put before the jury, or the trier of facts,  
22 whether you are entitled to something under the 1973  
23 agreement and whether it was a continuation, and so on.

24 So it seems to me at the moment there is  
25 really only a question of getting your position as to

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2 whether or not any further factual questions will remain  
3 to be determined after we finish with what we are doing  
4 now in order to decide the questions arising under the  
5 1973 agreement.

6 And if your position is that you don't believe  
7 any are, and you are indicating that that is your position,  
8 I would like to hear that and ponder that over the week  
9 end. Then I'll have to decide which of you I think is  
10 correct and where we go from here.

11 I can only say that it is not, I'm sorry to say,  
12 a question of choice. It is a question of whether I  
13 conclude that there are factual questions or not. If I  
14 conclude there are not any factual questions, then I'll  
15 be prepared to decide the questions that are put on my  
16 own, if you want me to, I guess that would be it, or put  
17 them to the jury in this proceeding.

18 If I decide, on the other hand, that there are  
19 factual questions and the defendants have a right to  
20 develop those facts, because although you had the right  
21 to supplement the complaint it can't be done at the expense  
22 of the defendant, then I'll simply have to put it off  
23 to the issues that arise under the December agreement  
24 until I can handle it as I would with any other case put  
25 before me.

2 MR. HELLERSTEIN: If your Honor please, this  
3 is a very informal memorandum we prepared this morning  
4 (handing) concerning the question whether any proof could  
5 come in with respect to that 1973 agreement, and we think  
6 the answer is that there cannot be any such proof, and  
7 I could touch upon these points that I have set out in this  
8 memorandum.

9 The first is the question whether the plaintiff  
10 would be entitled to any kind of recovery on the income  
11 that is set out in that 1973 agreement, and that really  
12 is the question whether the agreement is a renewal of  
13 the earlier agreement or not, in the very broad sense.

14 Plaintiff's right to compensation under the 1971  
15 agreement extended to everything that was earned, all gross  
16 revenues earned under that agreement or earned in connection  
17 with sales that had negotiations begun during that term  
18 or during the renewal of the term of any contract that  
19 might be --

20 THE COURT: Exhibit C and D?

21 MR. HELLERSTEIN: Yes, your Honor, any contract  
22 that might be made, any contract that might be made  
23 between IBM and Satra.

24 When we have this December 1973 agreement coming  
25 into play, that agreement began its life before the first

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2 IBM-Satra agreement expired by its terms or even could be  
3 inspired by its terms. That agreement of 1971, IBM-Satra  
4 agreement had a five-year term. It was terminable after  
5 three years if sales did not rise to a certain level,  
6 \$50 million.

7 Three years would have been September 1974. So this  
8 new IBM contract terminated the old contract and replaced  
9 it. So, *prima facie*, just looking at the contract  
10 documents themselves, what we have is a replacement of an  
11 existing contract and an extension of its terms.

12 THE COURT: Let me intervene here --

13 MR. HILL: Termination in the new agreement --

14 THE COURT: Let me intervene here just to give  
15 you this observation.

16 The difficulty of the situation is not the  
17 difficulty with your argument but the difficulty with the  
18 situation, as I see is, is that what you are really doing  
19 at that moment, and properly so, but perhaps untimely,  
20 is to make a motion for partial summary judgment, and I think  
21 that may be a very good way to crystallize the decision,  
22 but I think you are really saying that as a matter of law  
23 you are asking me to rule, are you not, that as a matter  
24 of law, the December agreement is something in which the  
25 plaintiff is entitled to share?

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2 MR. HELLERSTEIN: We think that is a law issue.

3 If your Honor thought it was a fact issue --

4 THE COURT: I don't know yet. I haven't had  
5 a chance to study it, but I will say that your position  
6 strikes me in effect as moving for partial summary judgment,  
7 and I am perfectly willing to grant a motion for summary  
8 judgment even if it's orally presented if I am convinced  
9 that there are no fact issues. But I am equally reluctant  
10 to, and indeed I won't have the right to, if I conclude  
11 that there may be fact issues, and I can't conclude that  
12 at this moment. I will just have to look over this  
13 material over the week end and see what I conclude.14 But if I do conclude that there are factual  
15 issues, I don't know what I could do except to put it down  
16 for trial. I will obviously try to put it down sooner than  
17 if it were a brand-new case.18 MR. HELLERSTEIN: Let me address myself to that  
19 point as well, just to finish this one off.20 What we have here is the need for a determination  
21 on as full a record as is relevant and appropriate for  
22 this situation.

23 THE COURT: Right.

24 MR. HELLERSTEIN: There was testimony during  
25 this trial of the introduction of this word "renewal" in

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2 Mr. Mott's handwriting and the like, and that would probably  
3 be relevant to a disposition of this particular issue.

4 And then there is also the question which has  
5 to be a legal question, and it has to be decided at any  
6 point in time, whether evidence of the dealings between  
7 Satra and IBM or what each of them might have had in  
8 mind is or is not relevant and admissible in terms of this  
9 case.

10 We take the position that is suggested in Dr. Stern's  
11 memorandum, that it is not because it is not binding on  
12 Dr. Stern. With that statement I move into the  
13 other aspect of your Honor's comment in terms of timeliness.

14 We moved last summer, because we had wind of a  
15 change, to obtain advance copies of this document, to  
16 learn about the negotiations and the like, and there was  
17 a protective order preventing us from doing anything of  
18 the kind, and eventually, after the contract was made --

19 THE COURT: A contested order?

20 MR. HILL: No. It was a consented order, your  
21 Honor.

22 MR. HELLERSTEIN: It was a consented order after  
23 a motion.

24 THE COURT: I used the word "timely." I  
25 didn't mean you had waited too long to raise the issue,

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2 although it might have been more convenient if we raised  
3 it earlier. What I meant to say was that it's been raised  
4 at a time when I'm not sure whether I can accommodate  
5 your desires and dispose of everything right off the bat.  
6 That's all I meant. I am not saying that you are out of  
7 court on pressing the proposition.

8 MR. HELLERSTEIN: I'll tell you what our real  
9 problem is, Judge, and it may be the practical putting of  
10 the question might resolve it. It would be very wasteful  
11 of everybody's energy and time if a new jury had to be  
12 convened to deal with all these issues.

13 THE COURT: I agree with you.

14 MR. HILL: We have waived a jury on this point.  
15 I don't know why this is even being discussed.

16 MR. FISHER: On our case?

17 THE COURT: No. On the December '73 case.

18 MR. HELLERSTEIN: On this point.

19 What I think --

20 THE COURT: I know what I could do, to tell you  
21 the truth.

22 If I should rule that I disagree with you and  
23 that they are entitled to put in evidence, is there any  
24 reason to believe that it would take longer than a day, if  
25 there were not a jury, to hear whatever there was to be

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2 heard on the question?

3 MR. HILL: I would certainly think not, your  
4 Honor. I mean all we have to do, I would suppose, is go  
5 and get the IBM people who were a part of this discussion.  
6 I don't know whether they are going to want pretrial  
7 discovery on this. If your Honor rules that we are  
8 entitled to put evidence in --

9 THE COURT: At the moment, and I am wording it  
10 like this, I have some time week after next, and I have  
11 plenty of things to do upstairs and I am not anxious to  
12 let it be invaded seriously, but if it only took a day  
13 or a day and a half, and if both sides were agreeable,  
14 that if I conclude, and I have no great desire to conclude  
15 one way or the other, that they are entitled to put in  
16 evidence, that the evidence would be put before me at that  
17 time and I would decide whatever was to be decided on the  
18 basis of that, that I can arrange.

19 MR. HILL: It is all right with us.

20 MR. HELLERSTEIN: That means the only issue we  
21 leave for this jury, then, if we accept this proposition,  
22 is the question of validity and enforceability of the '71  
23 contract.

24 MR. HILL: Yes, the contract issues. All the  
25 contract issues.

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2 MR. HELLERSTEIN: But all these issues about --  
3 what about the issue, for example, of incremental annual  
4 revenues and expenses or cumulative annual revenues and  
5 expenses? I don't want to be sandwiched into a position  
6 where the jury gets discharged and your Honor gets a  
7 submission and we find out that there is a material  
8 question --

9 THE COURT: As to what they decided?

10 MR. HELLERSTEIN: Yes.

11 THE COURT: No. I think it's got to be very  
12 clearcut. There is no doubt about that.

13 MR. HELLERSTEIN: It has to be clearcut --

14 THE COURT: I don't see any reason why you cannot  
15 between you draw a list of the issues that exist.

16 MR. HILL: We tried to raise the factual questions,  
17 your Honor, in the time available to us.

18 THE COURT: Yes, I know.

19 Draw a list of the issues that exist, with an  
20 attempt, and I would hope a successful attempt, to determine  
21 which ones of those are going to be decided by this jury  
22 and which ones are going to be decided by me, and if there  
23 is any disagreement, then, I would rule on which ones should  
24 be submitted to the jury, but I would make certain that all  
25 issues were decided by either the jury or me and that there

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2 can be no doubt about what issues were submitted to the  
3 jury so that nobody could claim res judicata when they  
4 came before me.

5 MR. HILL: That was the purpose, your Honor.  
6 I gather we were unsuccessful in the first list of questions  
7 that we gave the Court. You know, I'm not arguing --

8 THE COURT: I mean the issue relating to all  
9 those questions is did the plaintiff falsely induce the  
10 defendant to enter into the contract. That's the issue.  
11 There may be 75 misrepresentations, and the reason that  
12 I rejected your proposed questions would be because I  
13 thought that to put them as they were framed to the jury  
14 was unduly prejudicial to the plaintiff. And when I  
15 talk about a list of issues, I am not talking about a list  
16 of factual questions, I am talking about a list of issues.

17 They were that the jury would be called upon  
18 to decide whether or not the defendants were fraudulently  
19 induced into entering into the agreement, whether there  
20 was a consideration for the agreement --

21 MR. HILL: And whether there was an agreement.

22 THE COURT: -- and whether there was an agreement.  
23 And the next proceeding would presumably decide whether  
24 or not the plaintiff, if there is a favorable verdict  
25 for the plaintiff, is entitled to share in the profits

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2 under the December '73 agreement. And I really don't  
3 know what else. That would be about it, wouldn't it?

4 And compute whatever damages he is entitled to  
5 under that agreement or otherwise.

6 MR. FISHER: As the Court decides they are could  
7 be computed, because there is a question of incremental,  
8 annual and cumulative annual, and the Court would have  
9 to make the factual determination as to how the schedule  
10 is to be applied.

11 THE COURT: I think it would be preferable to  
12 leave that incremental business for the Court. But I'm  
13 not asking to have it up to the Court. In fact, to the con-  
14 trary, I would personally prefer to have it decided by the  
15 jury.

16 MR. HILL: We think it is a question for your  
17 Honor.

18 THE COURT: But I think I probably, after an  
19 explanation in more detail as to your respective positions,  
20 would be able to understand it better than the average  
21 juryman. I don't know.

22 MR. HELLERSTEIN: I would think so.

23 Could we go off the record?

24 THE COURT: Yes.

25 (Discussion off the record.)

2 THE COURT: Then let's leave it at this.

3 I believe it is the consensus of all of us that the most  
4 acceptable of the unsatisfactory alternatives available  
5 to us is to put to the jury for a general verdict the  
6 question of whether the plaintiff is entitled to recover  
7 against the defendants and the issues on which such a  
8 general verdict would turn, and the jury would be instructed  
9 to this effect to determine whether the parties entered  
10 into an agreement, binding agreement, and whether, if they  
11 did, the defendant was induced to do so because of the  
12 fraud of the plaintiff.

13 MR.HILL: I think there is also an issue of  
14 failure of consideration.

15 THE COURT: And the correlative issue of failure  
16 of consideration.

17 If the plaintiff prevails, thereafter the  
18 remaining issues, including the rights of the plaintiff,  
19 if any, under the December 1973 agreement, would be  
20 tried to the Court. Prior to that trial the Court will  
21 rule whether he believes the defendant is entitled to  
22 introduce any evidence with regard to the question whether  
23 the plaintiff is entitled to recover under the December 1973  
24 agreement. And, if so, the defendant, or the parties,  
25 will be entitled to such discovery as is appropriate.

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2 But every effort will be made to try the case before  
3 the Court no later than two weeks from now, that is, during  
4 the week of April 19th.

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2 THE COURT: Gentlemen, is that satisfactory to  
3 both sides?

4 MR. HILL: Yes, it's satisfactory to both sides.

5 MR. HELLERSTEIN: Yes.

6 MR. FISHER: Off the record.

7 (Discussion off the record.)

8 THE COURT: Let me add, and I assume that  
9 nobody questions it, that the Court would determine what  
10 damages the plaintiff is entitled to of any type, including  
11 but not limited to the December 1973 agreement.

12 All right, gentlemen. Thank you very much.

13 MR. HILL: One more thing, your Honor, just for  
14 the record. We have a memorandum of law on the mitigation  
15 point which we urge on your Honor.

16 MR. HELLERSTEIN: If for some strange reason  
17 there is a retrial of this matter --

18 THE COURT: You mean if there is a hung jury  
19 on the jury question?

20 MR. HELLERSTEIN: No, I was thinking after we  
21 go through the whole process and we're fortunate enough  
22 to get some recovery, and they appealed and there was some  
23 error, should we be wanting to deal with this same  
24 subject --

25 THE COURT: I would say that the disposition that

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2 we have arranged for the trial of the issues at this  
3 time ought not to be binding on the parties in the event  
4 of some future requirement for a retrial.

5 MR. HILL: I would suppose a lot would depend  
6 if it were sent downstairs and how it came down.

7 THE COURT: Off the record.

8 (Discussion off the record.)

9 (Adjournment taken to 10:00 a.m., Monday,  
10 April 3, 1974.)

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Oztemel-cross

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2 MARVIN STERN

3 v.

72 Civ. 143

4 SATRA CORP. and SATRA CONSULTANT

5 April 8, 1974  
10:00 a.m.

6

7 (Trial resumed.)

8 (In open court; jury present.)

9 A R A O Z T E M E L , resumed.

10 MR. HELLERSTEIN: Good morning, Mr. Oztemel.

11 THE WITNESS: Good morning.

12 CROSS-EXAMINATION CONTINUED

13 BY MR. HELLERSTEIN:

14 Q Mr. Oztemel, on Friday we discussed this  
15 exhibit, GGGG for identification. If I remember correctly,  
16 of the companies listed in the third paragraph of this  
17 you said that the only customer of yours with respect to  
18 the Kama River project was Swindell-Dressler Division  
19 of Pullman, Inc.?

20 A That's right.

21 Q Is that your testimony?

22 A That's right.

23 Q The other companies were not your customers?

24 A They are our customers, but without hope of  
25 participation because of the nature of their goods in the

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2 Kama River project.

3 THE COURT: I'm sorry, I was distracted.

4 Who did you say was your customer?

5 THE WITNESS: Swindell-Dressler.

6 I said further, your Honor, that there are some  
7 other customers, but because of the nature of their products  
8 we didn't feel they could have anything to do with the  
9 Kama River project.10 Q So the other companies may be customers but not  
11 in relation to the Kama River project?

12 A That's correct.

13 Q Do you remember being asked at your deposition  
14 on May 5, 1972, at Pages 251 and 252:15 "Q Does Satra have any commitments from any  
16 companies to receive fees or income in connection with the  
17 Kama River project?"18 And do you remember answering with respect to  
19 that question, on 252, Line 14:20 "A I could tell you the ones I recall; Bendix,  
21 Bliss, that's all I can recall, and it's other than  
22 Swindell."

23 Do you remember giving that testimony?

24 A I don't, but obviously it's true.

25 Q I observe, Mr. Oztemel, that among the companies

1 3 rgmch

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2 that you said who were not your customers with respect  
3 to Kama River, Bendix and Bliss are both mentioned.

4 Do you see that?

5 A I do.

6 Q Do you wish to change your testimony?

7 A No, Mr. Hellerstein. At this point my statement  
8 is true.

9 Q But at that point you had other customers?

10 A At the time you asked me they had possibilities,  
11 perhaps, yes.

12 You named them as customers, as clients, did  
13 you not, Mr. Oztemel?

14 You answered you had commitments from those  
15 companies to receive fees or income in connection with the  
16 Kama River project; is that true?

17 A Yes. For instance, Bliss was working on a  
18 forging plant for some coins, et cetera.

19 Q You testified at the deposition, did you not,  
20 that with respect to Swindell you had two prospects, one  
21 for engineering of around 16 million, and the other for  
22 the foundry itself, which was about 400 million; is that  
23 correct?

24 A I think in the beginning Swindell at least may have  
25 had hopes to that extent, yes.

2 Q That was true in the end of 1971, was it not?

3 A I don't know if it was ever true. All I can tell  
4 you is that Swindell had hopes of getting the whole foundry  
5 project. Eventually, it didn't come anywhere near it.

6 Q You had hopes along with Swindell, is that  
7 correct, for yourself?

8 A Well, it doesn't serve any purpose. I would  
9 have to tell you now, but that it's neither here or there.

10 Q You testified yes; is that correct?

11 A Well, you are asking me personally, Mr.  
12 Hellerstein.

13 At this moment, my recollection is that I did  
14 not have great hopes.

15 THE COURT: Are you asking Mr. Oztemel personally,  
16 or are you asking him as to whether Satra had hopes, or  
17 what is your question?

18 MR. HELLERSTEIN: I don't know, your Honor.  
19 I never knew there was a distinction until now that Mr.  
20 Oztemel has made one.

21 THE COURT: Now that you know he made one, which  
22 are you asking, or are you asking if either had hopes?

23 MR. HELLERSTEIN: Let me withdraw the question.

24 Q Were you asked the following question and did  
25 you give the following answer, at Page 251 of that deposition:

2 "Q Does Satra expect to receive any money in con-  
3 nection with that project?

4 "A Satra has high hopes."

5 Did you give that answer, Mr. Oztemel?

6 A Obviously.

7 Q Did you distinguish yourself from Satra?

8 A Yes.

9 Q You mean Satra may have high hopes while Mr.  
10 Oztemel has low hopes; is that correct? Is that your  
11 testimony?

12 A No, Mr. Hellerstein, but as you yourself heard,  
13 Mr. Giffen was running the company and he based his goals  
14 and objectives and he had my opinions. We were guided  
15 by the opinions and objectives of the person who was  
16 running it.

17 Q Is that your answer?

18 A Yes, sir.

19 Q Is that your whole answer?

20 A Pardon?

21 Q Is that your whole answer?

22 A As far as your question as I remember it, yes,  
23 sir.

24 Q All right. We will leave that subject.

25 When you were meeting IBM in the company of Dr.

1 6 rgmch

2 Stern in August of 1971, did you have the impression  
3 that Dr. Stern was meeting the people that you were meeting  
4 for the first time?

5 A I believe you asked me that and I told you that  
6 I didn't really have an opinion one way or the other, but  
7 if you had to ask me --

8 Q I am asking you, Mr. Oztemel. That's what I am  
9 goind. I am asking you.

10 MR. HILL: Your Honor, I wonder if we could --

11 THE COURT: Mr. Hellerstein, I don't think that's  
12 necessary.

13 But, in any event, would you state whether you  
14 had any view?

15 THE WITNESS: In especially one case, your  
16 Honor. I was about to say, yes, I had the impression since  
17 Mr. Jones had confused our personalities, definitely  
18 that it was the first time they were meeting.

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2 Q Did you meet Mr. Jones in August?

3 A I can't recall.

4 Q My question was August 1971 with respect to the  
5 IBM people that you met. Can you answer that question?

6 THE COURT: Did you meet him at all or for the  
7 first time, do you mean?

8 MR. HELLERSTEIN: If your Honor please, I am  
9 asking in August of 1971 when he and Dr. Stern had the  
10 meeting, whether IBM had the impression that he was meeting  
11 these IBM people for the first time.

12 THE COURT: Other than Mr. Jones?

13 MR. HELLERSTEIN: Then he answered Mr. Jones  
14 and then I just qualified that Mr. Jones wasn't among the  
15 group that he met in 1971.

16 A Would you be kind enough to tell me who we met?  
17 I really don't recall who we met.

18 Q You tell me, Mr. Oztemel. Give me some names  
19 that you met in August of 1971 from IBM.

20 A I would have to guess, Mr. Hellerstein. In  
21 August perhaps we met Mr. Stafford. We met Mr. Farr. I  
22 don't know if that was August. I met Mr. Hendricks. I  
23 don't know whether it was August or if it was with Dr. Stern.

24 Q Anybody else?

25 A I met with Mr. Witham, but once again I recall

2 that when we met Mr. Farr it was because Mr. Witham was not  
3 there. I don't know if we met in August or September.

4 Q Is there anybody else from IBM that you remember  
5 meeting in August?

6 A Since you told me Mr. Jones was beyond August,  
7 no, I don't.

8 Q I am not telling you anything. I am only asking  
9 you, Mr. Oztemel.

10 A And I tell you that I don't recall.

11 Q Have we now gotten from you everybody from IBM  
12 that you remember meeting before you made the contract with  
13 Dr. Stern on August 31 of 1971?

14 A No. I can tell you all the personalities in  
15 IBM that I have met.

16 Q With Dr. Stern?

17 A No. I cannot tell you that. I don't recall.  
18 I can only tell you who I met of IBM and I cannot tell you  
19 whether they were before or after the contract.

20 Q I am only asking for your recollection,  
21 Mr. Oztemel.

22 A I do not recall, sir.

23 Q That's all you recall?

24 A That's right.

25 Q With respect to those people that you mentioned,

1 3rgd Oztemel-cross 780

2 did you have the impression at the time that Dr. Stern was  
3 meeting them for the first time?

4 A I have no distinct impression in many cases  
5 except in the case of Mr. Jones where distinctly it was that  
6 they had not known each other before.

7 Q They had not known each other before?

8 A No.

9 Q How about the other people you mentioned,  
10 Farr, Witham, Hendricks and Stafford. What was your  
11 impression as to whether or not Dr. Stern had known them  
12 before? Did you have an impression one way or the other?

13 A At this moment I don't recall that I had an  
14 impression one way or the other.

15 Q You testified that you thought Dr. Stern was  
16 very influential with IBM. Does that refresh your recol-  
17 lection as to whether or not he had known those people or  
18 given you the impression of knowing those people before you  
19 met?

20 A I testified, Mr. Hellerstein, as to my knowledge  
21 of how Dr. Stern was influential and I told you that it was  
22 at the very top level.

23 Q You said he knew Ambassador Thompson; is that  
24 correct?

25 A Yes, who was a close confidante or friend of

2 Mr. Watson.

3 Q Wasn't it the testimony that Ambassador  
4 Thompson was a consultant to Mr. Jones and not to Mr. Watson?

5 A I don't recall that.

6 Q Let's go back to the people that you named.

7 Was it your impression that Dr. Stern was meeting these  
8 people for the first time before you made your agreement with  
9 Dr. Stern?10 MR. HILL: Your Honor, that has got to be at  
11 least the sixth time that question has been asked and  
12 answered.

13 THE COURT: It's been asked and answered.

14 MR. HELLERSTEIN: I am not getting a complete  
15 answer. That's why I am repeating the question.16 THE COURT: I have in my notes that the witness  
17 has no distinct impression whether or not he believed  
18 Mr. Stern -- Dr. Stern had met them before or not, with the  
19 exception of Mr. Jones, in whose case he had a distinct  
20 impression.

21 Was that your answer?

22 THE WITNESS: A distinct impression, yes.

23 Q You had a distinct impression with Mr. Jones  
24 that Dr. Stern did not know him and he did not know  
25 Dr. Stern?

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2 A That's right.

3 THE COURT: If you are going to another line of  
4 questioning --5 MR. HELLERSTEIN: I have just one more question,  
6 sir.

7 THE COURT: All right, fine.

8 Q Did you testify at page 3023 of your pretrial  
9 deposition on May 8, 1972, as follows:10 "Q At all the meetings you attended with  
11 IBM together with Dr. Stern did you believe that was the  
12 first time Dr. Stern was meeting those people?

13 A Frankly, yes."

14 Q Is that your testimony, Mr. Oztemel?

15 A That's right; asked in a different way.

16 Q Could you tell me how you distinguished between  
17 that question and the one I asked you?18 A You asked me obviously at that time whether I  
19 believed that it was the first time. Now you are asking me  
20 what was my impression. I believed because Dr. Stern told  
21 me in many cases that it was the first time he was meeting.  
22 My impression -- I have no distinct impression.

23 Q You distinguish between belief and impression?

24 A Yes, sir.

25 Q All right, I am happy to hear that.

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2 THE COURT: Mr. Hellerstein, I am sorry to say  
3 I have another matter I have got to take care of. It will  
4 take five to ten minutes, so whenever you are starting on  
5 a new line --

6 MR. HELLERSTEIN: Right now, your Honor.

7 THE COURT: All right. Will the parties in the  
8 United States v. Fitzgerald matter please come into the  
9 hearing room with the reporter.

10 You can all stay here and I will try and dispose  
11 of all this as quickly as possible.

12 (Recess.)

13 THE COURT: Pardon the interruption. We'll have  
14 smooth sailing now.

15 Q Mr. Oztemel, I show you Exhibit UUU. Your  
16 counsel introduced this at some point during the trial.  
17 That was an article about you in Der Spiegel; is that  
18 correct?

19 A Yes.

20 Q Is Der Spiegel a prominent German newspaper in  
21 Europe?

22 A So I am told, Mr. Hellerstein.

23 Q As you understand -- you are a world traveler.

24 A Yes.

25 THE COURT: I will take judicial notice that it

1 7rgd Oztemel-cross 784  
2 is, yes.

3 Q So all those who regularly read this newspaper  
4 and came across this article would know about Satra and  
5 about you?

6 A I would assume so, yes.

7 Q I show you Exhibit TTT for identification. Is  
8 that an article in Business Week magazine in the issue of  
9 June 19, 1971 about you and your company?

10 A Yes.

11 Q In fact, weren't some of your personnel on the  
12 cover of Business Week?

13 A That's correct.

14 (Continued on page 785.)

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2 Q And the article goes on and talks about your  
3 situation with Mack Trucks and Kama River quite extensively,  
4 doesn't it?

5 A Yes, it does.

6 Q And so all those who read that article would  
7 know about you and your company?

8 A I would assume so, yes.

9 THE COURT: This is June 1971, did you say?

10 MR. HELLERSTEIN: That's correct, your Honor.

11 Q Now, when you entered your discussions with IBM  
12 in August and September of 1971, with Dr. Stern, did you have  
13 in your mind that it was likely that one or more of the  
14 officials with whom you were discussing had directly or  
15 indirectly come across your company in Der Spiegel or  
16 Business Week?

17 A I didn't give it much thought. I don't recall  
18 that I had any thoughts.

19 Q Whether you gave it much thought or didn't give  
20 it much thought, it was clear to you, was it not, that IBM  
21 didn't need to get the information about Satra through  
22 Dr. Stern, they could have gotten it directly?

23 A I couldn't make that statement. It is possible  
24 that if they read it -- as a matter of fact, it turned out  
25 that Mr. Stafford had not seen the Business Week, for

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2 instance.

3 Q But he had recognized you from your picture in  
4 Der Spiegel, is that correct?

5 A That's correct.

6 Q So it was clear, at least with Mr. Stafford,  
7 that he knew you directly and not through Dr. Stern, or  
8 knew about you.

9 A Yes.

10 Q And this was before you made your contract with  
11 Dr. Stern.

12 A Before we made our contract?

13 Q It is clear you met Mr. Stafford before you  
14 made your contract with Dr. Stern, isn't it?

15 A Yes.

16 Q Now, Mr. Giffen testified here, if I recall  
17 correctly, and I'll put the question to you, that there  
18 were discussions of retainers among the Satra people that  
19 would be requested of IBM in the range of \$100,000 to  
20 \$500,000 a year. Does that accord with your recollection,  
21 Mr. Oztemel?22 A I think a good deal of the discussions were  
23 without me. Those numbers don't seem familiar to me.24 Q What is your recollection of the retainers that  
25 were discussed as a possibility of approaching IBM?

2 A I think I was pretty much left out of that  
3 discussion. I think it was mostly with Mr. Giffen and  
4 Dr. Stern.

5 Q I take it that Mr. Giffen or Dr. Stern reported  
6 to you from time to time as to what the approach of Satra  
7 was to meet IBM.

8 A I think they reported conclusions, which I  
9 believe was rather controversial, between Mr. Giffen and  
10 Dr. Stern.

11 Q I'm sorry. I didn't hear that.

12 A I said I believe they reported some conclusions  
13 after their discussions, and I remember that they each had  
14 different views of what to charge and not to charge.

15 Q With respect to the conversations and reports  
16 that were made to you, was the subject of retainers discussed  
17 at any time?

18 A Yes.

19 Q And was it discussed with you that one  
20 possibility might be to ask IBM for sizeable retainers?

21 A Yes, the concept was discussed with me.

22 Q And about when was it discussed? Was it during  
23 the course of these discussions with IBM, in August and  
24 September of 1971?

25 A I would assume so.

2 Q Is that the best of your recollection?

3 A That's right.

4 Q I show you Exhibit AA for identification. Is  
5 that the form for a consultant's contract that Satra uses?

6 A Yes.

7 Q And was that the form that was given to IBM to  
8 be modeled in the final preparation of agreements between  
9 IBM and Satra?

10 A I have so understood recently. I understand  
11 that it was given by Dr. Stern, yes.

12 Q Was this the form that was generally available  
13 for use by Satra in terms of possible deals and negotiations  
14 with companies for whom it was to consult?

15 A That is correct, yes.

16 Q Is it clear, Mr. Oztemel, that it is usual  
17 practice on the part of Satra Corporation to ask for a  
18 retainer as payment for consultation and other advice that  
19 Satra extends to its clients?

20 A As far as Satra Consultant Corporation is con-  
21 cerned, yes.

22 Q I refer you to page 3 of the form contract,  
23 paragraph A, which makes reference to the possibility of  
24 semi-annual installments in terms of payments of fixed  
25 retainer fees. Is that correct?

2 A So I see, yes.

3 Q And is that one usual way of being paid a  
4 retainer from clients?

5 A I couldn't tell you.

6 Q Would monthly payments also be --

7 A Yes, I believe there are monthly, quarterly,  
8 annual, semi. I think there are all those. I don't know  
9 which is more predominant.

10 Q Depending on the company that is involved?

11 A That is correct.

12 Q Turning to a different subject, Mr. Oztemel,  
13 you testified on direct, and perhaps also on cross-examination,  
14 as to the reasons that you told Dr. Stern that you would  
15 not make any more payments under the contract, is that  
16 correct? You gave some reasons for that?

17 A Yes.

18 Q Was one of the reasons that Mr. Giffen could not  
19 get along well with Dr. Stern?

20 A Not that I remember.

21 Q Did you tell IBM that that was the reason?

22 A Not so far as I remember.

23 Q Did you tell IBM that that was an important  
24 reason?

25 A I have no such recollection.

2 Q I show you Exhibit AAA for identification, a  
3 memorandum from Mr. Hendricks of IBM to Mr. Witham of IBM,  
4 subject Satra, dated April 12, 1972. Would you look at that  
5 memorandum. Does the fourth paragraph refresh your recol-  
6 lection as to a conversation that you held around the day of  
7 that memorandum with Mr. Hendricks?

8 A No, it does not. I don't recall the conver-  
9 sation, but I see what it says here.

10 Q You have no recollection one way or another  
11 about that conversation, Mr. Oztemel?

12 A No, sir.

13 Q You don't deny that conversation, do you?

14 MR. HILL: Just a minute. I object to that.

15 THE COURT: Overruled.

16 Q You don't deny that conversation, do you?

17 A No. I would take Mr. Hendricks' word that it  
18 was discussed but I have no recollection of it, sir.

19 Q Look at the second paragraph of that memorandum.  
20 Does that report matters that you told IBM around that time?

21 A This one here (indicating)?

22 Q No. This one (indicating).

23 A This one. I'm sorry.

24 (Pause.)

25 I remember clearly the subject of this conver-

2 sation.

3 Q How about the third paragraph?

4 A I remember. It is also pertaining to that one,  
5 yes.6 Q We'll skip the paragraph that you don't  
7 remember. What about the one after that that makes refer-  
8 ence to Mr. Proehl?

9 A That's not clear, either in my mind.

10 Q Did you tell IBM that Mr. Proehl would be  
11 primarily involved in the liaison that was necessary  
12 between Satra and IBM?13 A I don't recall making the statement. But it is  
14 there and I would not dispute Mr. Hendricks' recollection.

15 Q How about the next paragraph?

16 A I don't remember discussing that one either.

17 Q And the last paragraph?

18 A No, sir. I'm sorry. I have no clear recol-  
19 lection of that either.20 Q Have you looked through this memorandum,  
21 Mr. Oztemel, does it refresh your recollection that you  
22 told IBM that Mr. Giffen was one of the main reasons for  
23 your controversy with Dr. Stern?

24 A No, it does not, sir, no.

25 Q Now, you testified, Mr. Oztemel, if I remember

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2 correctly, that you had a conversation with Dr. Stern on  
3 August 10, 1971 and as a result of that he wrote up a  
4 memorandum and that Exhibit A was that memorandum (handing),  
5 is that correct?

6 A Yes.

7 Q And you testified that you had a dispute with  
8 Dr. Stern, or a series of discussions or negotiations, con-  
9 cerning salary and expenses, is that correct?

10 A That's right.

11 Q You didn't mention having any dispute or discus-  
12 sion about paragraph 2, (reading) "whatever benefits are  
13 derived from these efforts, will be shared equally by the  
14 partners"?

15 Did you have any discussion or negotiation about  
16 that?

17 A No, we did not. It was clear that we were going  
18 to share the efforts and share the benefits.

19 Q And this was because of the concept that you  
20 had testified to that you were interested in forming a  
21 partnership with Dr. Stern, you to contribute your experi-  
22 ence in trade with Far Eastern countries and Dr. Stern to  
23 contribute his access to American companies that were  
24 technologically oriented?

25 A Not quite so, Mr. Hellerstein. The excess was

2 good to have. But our problem was that to service these  
3 companies you need a very deep and sophisticated technical  
4 knowledge. That knowledge did not exist in our company and  
5 that was the basis of the partnership.

6 Q Why do you need a deep technical knowledge to  
7 service such companies?

8 A Because the nature of their work in a given  
9 industry is such that you have to have somebody to understand  
10 their products and speak the language of the would-be buyers.

11 THE COURT: When you say "technical knowledge,"  
12 do you mean technological knowledge?

13 THE WITNESS: Technological. I'm sorry.

14 THE COURT: In other words, related to science  
15 or art, whatever it is?

16 THE WITNESS: Technological knowledge, yes.

17 MR. HELLERSTEIN: Would you read back the last  
18 few phrases of that answer, please?

19 (Record read.)

20 Q I take it they have such companies generally,  
21 lots of people who are successful in selling and who are  
22 technologically sophisticated. That's generally correct,  
23 is it not?

24 A I didn't get the question.

25 Q I'm asking about the need of Satra for having  
somebody with substantial technological capacity.

2 A Yes.

3 Q In light of the fact that the companies who are  
4 being serviced naturally have plenty of such people, what is  
5 the need of Satra to have such people?6 A Because you are working in a country where the  
7 technicians of your client are not familiar with -- the  
8 first encounters and the first discussions, the first sales  
9 efforts are necessarily on Satra's part. So Satra, or who-  
10 ever is there representing Satra in that first effort, must  
11 be able to expose the customer to the technology that he is  
12 trying to sell and first find out if there is an interest  
13 before taking your client's technicians out there.14 But even through the life of the contract Satra  
15 would be responsible for servicing the contract. It is  
16 absolutely necessary that our people know what they are  
17 talking about.

18 (Continued on page 795.)

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1 jgmch Oztemel-cross

2 Q So from Satra's point of view it is useful to  
3 you to have someone in your employ or affiliated with you  
4 that understands the companies that you are dealing with.

5 A No, Mr. Hellerstein. To understand a company or  
6 the structure of a company -- Borg-Warner is also a very  
7 large company and we understand. But we felt adequate  
8 to service that one because their products are not that  
9 technological.

10 Now, the reason we never went after the highly  
11 sophisticated companies is because we didn't have the  
12 personnel, and I was happy to find Dr. Stern.

13 Q Because he understood the nature of the services  
14 and equipment that IBM sold?

15 A No, because he understood the nature of the  
16 highly complicated technological products.

17 Q And he could relate that understanding to other  
18 personnel in Satra?

19 A Or to the customer.

20 Q The customer being Russia?

21 A In this case, yes.

22 Q So that was the attraction of Dr. Stern to you,  
23 I take it, among other things.

24 A That was the attraction, yes.

25 Q All right.

1 2 jgmch

Oztemel-cross

2 Now, did you ever call upon Dr. Stern to have  
3 any communications with any officials of the Russian  
4 government to tell them what IBM might be capable of selling?

5 A Well, we were not --

6 Q Answer yes or no, Mr. Oztemel.

7 A No.

8 Q Was it Dr. Stern who brought up the idea of IBM  
9 to you?

10 A Yes.

11 Q Was it Dr. Stern who introduced IBM to you, to  
12 Satra?

13 A Within the definition of "introduction," it was  
14 Dr. Stern -- through him we met IBM executives.

15 Q That is a pretty good definition. I will take it.

16 Was it Dr. Stern who eventually helped Satra  
17 to conclude a deal with IBM?

18 A On his insistence, he negotiated the whole thing,  
19 practically, yes.

20 Q Answer yes or no, please.

21 Was it Dr. Stern who helped Satra conclude a deal  
22 with IBM?

23 A He concluded it himself.

24 Q So the answer is yes?

25 A Yes.

1 3 jgmch Oztemel-cross

2 Q Did you agree to pay Dr. Stern fifty percent of  
3 your income from IBM?

4 A Yes.

5 Q Did you enter into a contract with Dr. Stern,  
6 a contract dated August 31st, accepted by him on  
7 September 1st?

8 A Again I must qualify it to differentiate a  
9 contract and an agreement. I entered into an agreement  
10 with Dr. Stern.

11 Q And you understood the agreement was a legally  
12 binding one when you entered into it?

13 A Yes.

14 Q The answer is yes?

15 A Yes.

16 Q In your testimony at the trial you referred to  
17 Exhibit C. You referred to the document composed of the  
18 offer, the irrevocable offer on your part dated August 31st,  
19 and the acceptance by Dr. Stern on September 1st as a  
20 document, is that correct (handing)?

21 A What is the question again, sir?

22 Q I said you referred to it as a document.

23 A I suppose, yes.

24 Q And you gave this testimony, and I read from  
25 Page 684 of the cross-examination in this trial:

1 4 jgmch

Oztemel-cross

2 "No, because the document was not the agreement."

3 Did you give that testimony?

4 A Perhaps something like that. I don't know if  
5 those are the only words.6 MR. HILL: Could we have the rest of that answer  
7 read to the witness? Maybe that would be helpful.8 MR. HELLERSTEIN: Mr. Hill could read whatever  
9 he wants.10 THE COURT: If there is any question in the witness'  
11 mind as to what he said, he is entitled to see the trans-  
12 cript and agree as to whether or not this is what you asked  
13 him.

14 Would you like to see the transcript?

15 THE WITNESS: Yes, your Honor.

16 MR. HILL: May I take it up?

17 MR. HELLERSTEIN: Yes. 684.

18 (Pause.)

19 THE COURT: Does the transcript, as far as you  
20 recall, correctly state the question and the answer?21 THE WITNESS: The transcript, your Honor, is  
22 correct, yes. But it is not as --23 THE COURT: That's really all we need to estab-  
24 lish. Counsel can read whatever they want from the  
25 transcript.

1 5 jgmch

Oztemel-cross

2 Q You referred to that as a document and you dis-  
3 tinguished it from an agreement. You said the agreement  
4 was something else; is that correct?

5 A I said that the agreement had to be much broader  
6 because this did not include all our understandings.

7 Q That paper, Exhibit D --

8 A This one?

9 Q -- the irrevocable offer and the acceptance  
10 of Dr. Stern, when you signed it and when Dr. Stern delivered  
11 it to you, did you consider that a legally binding  
12 agreement?

13 MR. HILL: I am going to object, your Honor.  
14 I don't know whether that is even relevant, whether he  
15 considers it to be legally binding.

16 THE COURT: I think it is relevant, but I think  
17 the defendant already earlier answered.

18 According to my notes, he understood at the  
19 time it was legally binding.

20 MR. HELLERSTEIN: I just want to make sure that  
21 it is still his testimony after he has seen the transcript  
22 of what he said before.

23 Q Is it still your testimony, Mr. Oztemel?

24 A I made the offer; it was accepted. I considered  
25 it binding, Mr. Hellerstein, yes.

1 6 jgmch

Oztemel-cross

2 Q And was that legally binding agreement, as you  
3 understood it, subject to a more formal written contract?

4 A Again, formal, I don't know. But it was certainly  
5 subject to a contract which included all the provisions  
6 which Dr. Stern and I clearly understood.

7 Q So your testimony is that that contract was  
8 subject to something else, meaning that it depended on some-  
9 thing else before it became legally binding? Is that your  
10 testimony?

11 A I would not venture to define the legalities  
12 there, Mr. Hellerstein, except that --

13 Q I'm asking about your understanding.

14 MR. HILL: Let him finish.

15 THE COURT: Yes, Mr. Hellerstein.

16 Sustained.

17 Q I am asking about your understanding, Mr. Oztemel.

18 A My understanding was that we had the essence of  
19 an agreement. My further understanding was that we were  
20 then to draft another contract incorporating and including  
21 all the other many things that Dr. Stern and I understood,  
22 but because of time could not be incorporated into this  
23 short agreement.

24 Q The question, Mr. Oztemel, is whether that piece  
25 of paper, Exhibit D, the irrevocable offer and Dr. Stern's

2 acceptance, depended on anything else in your mind  
3 before it became a legally binding obligation of Satra  
4 Corporation as you understood it at the time.

5 A Again, I would have to leave out "legally,"  
6 Mr. Hellerstein, because that is not my profession or  
7 business.

8 Q Let's leave out "legally"; a binding agreement.

9 Did you understand it to have depended on anything  
10 else to be a binding agreement at the time?

11 A With the assumption that we both had that there  
12 would be nothing that was the subject of disagreement in  
13 the overall, yes, it was binding.

14 Q So the answer to the question is that when you  
15 received Dr. Stern's acceptance on September 1st, you  
16 considered that a binding agreement on Satra Corporation,  
17 not subject to anything else?

18 A I considered it, Mr. Hellerstein, a binding  
19 agreement on both sides, with all the verbal commitments  
20 made on both sides which did not appear here, so  
21 to that extent, yes.

22 Q Oh, you are introducing other elements.

23 I want to be clear. Did you consider that  
24 document, when Dr. Stern delivered his acceptance on  
25 September 1st, a binding agreement on Satra Corporation not

1 8 jgmch

Oztemel-cross

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2 subject to anything else? Yes or no?

3 MR. HILL: I object, your Honor. That question  
4 has been asked and answered again at least a half-dozen  
5 times.6 THE COURT: I think it has been answered. But  
7 it is a subject of importance which the jury should  
8 understand clearly. I'll allow the answer to this  
9 question and then I'll sustain the objection to further  
10 questions on the subject.11 I know what you want, Mr. Hellerstein, but I think  
12 you have gotten reasonably good answers and I'll allow  
13 just one more.14 MR. HELLERSTEIN: Could the witness be asked  
15 to answer yes or no, if he can?16 THE COURT: No, I won't direct him to answer yes  
17 or no.18 Mr. Greenberg, will you read back the last  
19 question, please?

20 (Question read.)

21 THE COURT: Let me modify it.

22 I will ask you to answer yes or no and then, if  
23 you wish to make an explanation after answering yes or no,  
24 you may do so.

25 A In answer to yes or no, my answer is no. My

1 9 jgmch Oztemel-cross

2 answer is no because I considered it a binding agreement  
3 not only on Satra but also with Dr. Stern to go ahead and  
4 draft another document incorporating the totality of our  
5 agreements.

6 Q Do you recall having been asked the following  
7 question and giving the following answer on May 4, 1972  
8 in your pretrial depositions, Page 157, Line 4:

9 "Q Is that spelled out in your agreement with  
10 Dr. Stern that it was subject to a more formal written  
11 contract?

12 "A No."

13 Did you give that testimony?

14 A If it's there, I must have, although it surprised  
15 me. I must have not understood your question.

16 Q You have drawn a blank. You don't remember it.  
17 Or do you remember it?

18 A I didn't say that. I just don't recall. It has  
19 been months, almost a year.

20 THE COURT: I take it the reference there was  
21 to Plaintiff's Exhibits C and D, what we are calling  
22 Plaintiff's Exhibits C and D?

23 MR. HELLERSTEIN: Yes, your Honor.

24 Q When did you sign this transcript?

25 MR. HILL: Excuse me, Mr. Hellerstein. Could I

1 10 jgmch Oztemel-cross

2 ask you to give me the page and the line?

3 MR. HELLERSTEIN: 157, Line 4.

4 MR. HILL: You didn't read the next two questions  
5 and answers.

6 MR. HELLERSTEIN: No. I just read the first one.  
7 I'll read another one in a minute.

8 Q When did you sign this transcript, Mr. Oztemel?

9 A I believe about three weeks ago.

10 Q Three weeks ago.

11 Were your answers truthful when you read it three  
12 weeks ago?

13 A Frankly, Mr. Hellerstein, I was just leaving. I  
14 never had a chance to read it, I regret to say, so I  
15 couldn't tell you.

16 Q Did you swear to the truth of the answers you  
17 gave in the deposition before a notary public?

18 A I think that's the procedure, yes, sir.

19 Q And you did?

20 A Yes.

21 Q So you swore to the truth.

22 Did you give the following answer to the following  
23 question immediately following, on Page 157:

24 "Q Did you tell him that this agreement was not  
25 binding until you got a formal contract?

1 11 jgmch Oztemel-cross

2 "A No. But there was a discussion at some time  
3 that a formal contract would be drafted."

4 Did you give that testimony?

5 A That's still my understanding.

6 Q But there was no question in your mind at the  
7 time that Exhibit D was a binding agreement on Satra  
8 Corporation not subject to any thing else?

9 A I will repeat, Mr. Hellerstein, I considered it  
10 a binding agreement for both sides, both Satra Corporation  
11 and Dr. Stern.

12 MR. HELLERSTEIN: I have no further questions.

13 MR. HILL: I have no questions.

14 THE COURT: Thank you, Mr. Oztemel.

15 (Witness excused.)

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2 THE COURT: Mr. Hill, you are still at bat.

3 MR. HILL: We have nothing further, your Honor.

4 THE COURT: The defense rests?

5 MR. HILL: The defense rests.

6 THE COURT: Ladies and gentlemen, I want to discuss  
7 the legal posture of the case with the attorneys, so  
8 will you please make yourselves comfortable in the jury  
9 room.

10 (The jury left the courtroom.)

11 THE COURT: Mr. Hellerstein, do you have motions  
12 to address to the Court?

13 MR. HELLERSTEIN: Yes, your Honor.

14 Would your Honor give me just a moment?

15 THE COURT: Surely.

16 (Pause.)

17 MR. HELLERSTEIN: If your Honor please, I would  
18 like on behalf of the plaintiff to move to strike the  
19 affirmative defenses and counterclaims alleged in the answer  
20 and for a directed verdict under Rules 41(c) and 50 of  
21 the Federal Rules of Civil Procedure on the ground of  
22 insufficiency of law and failure of proof. I needn't  
23 recount the evidence because I think your Honor has a fine  
24 grasp of it. I just want to say a word about one particular  
25 small point -- sub-point of the overall motion.



1 3 rgmch

2 The only issue with respect to the affirmative  
3 defenses that is in the case, assuming that there is  
4 sufficiency of proof, is the defense that Dr. Stern  
5 misrepresented and to plead that same defense in a different  
6 verbiage seems to me to be confusing and prejudicial  
7 and I can't see any need for having this separate first  
8 affirmative defense. So that is the sub-point under the  
9 heading of the overall motion.

10 As I said before, I think it doesn't need any  
11 argument with respect to the total insufficiency because  
12 your Honor has heard the proof in this trial.

13 THE COURT: Do you wish to say anything, Mr.  
14 Hill?

15 MR. HILL: I am going to ask Mr. Simon to address  
16 himself to that, along with our own motion for a directed  
17 verdict.

18 THE COURT: All right.

19 MR. SIMON: If the Court please, I am not really  
20 sure I followed all of Mr. Hellerstein's argument. It is  
21 not before me in written form and I would tell the Court  
22 that I did not pay that much attention to it, but what it  
23 appears to me to be stating is that there was a duplicity  
24 in submission, perhaps based upon the pleadings, between  
25 a misrepresentation and failure of consideration, and I

1 4 rgmch

2 think the analogy is fairly easy to see, if the Court would  
3 let me indulge for a moment in a sporting analogy.

4 If I were approached on the street and someone  
5 told me that he knew that Black Widow would win the fifth  
6 tomorrow at Aqueduct, and that he knew it because he had  
7 a special prescience or particular study and what-not;  
8 he had definite information indicating that to be true, and  
9 if in fact Black Widow did not win the fifth at Aqueduct,  
10 if we are still at Aqueduct, I think that is both a mis-  
11 representation and a failure of consideration, the mis-  
12 representation being in the failure of prescience and the  
13 failure of consideration being, in legal terms, the failure  
14 to deliver a benefit or a detriment. It is rather  
15 clear in the law the party has nothing to do with the  
16 conferring of the benefit if it is simply fortuitous as  
17 to him. While there may be consideration, it is not con-  
18 sideration of any promise made to him. I think that it's  
19 easy to see, your Honor, that that is a sufficient response  
20 to support that particular portion.

21 If we may, your Honor, we will go forward and make  
22 the motion for a directed verdict under Rule 50 on behalf  
23 of the defendants. In this connection, your Honor, we will  
24 raise again the same point which we raised at the close of  
25 the plaintiff's case, with perhaps a bit of a preface before

1 5 rgmch

2 we get into some particular points of the testimony that  
3 should be called to your Honor's attention. It is, indeed,  
4 all very well for Dr. Stern to state that it would serve  
5 the ends of justice to liberate a very substantial sum of  
6 money from Mr. Oztemel and give it to him. That, of course,  
7 is his position that he is entitled to more than a finders  
8 fee which was offered to him on repeated occasions. He  
9 makes that contention based upon three specific factual  
10 obligations. Going to the agreement, in this agreement  
11 there is included as factors for consideration of the  
12 Court the income, the expenses, and whatever services  
13 were to be performed in order to earn the income.

14 It is Dr. Stern's construction, interpretation --  
15 indeed, it is his whole case, that he must be considered  
16 to prevail on all issues.

17 Number One, he is entitled to fifty percent of  
18 income, so he says;

19 Number Two, he was not required to perform any  
20 services whatsoever; and

21 Number Three, he is not to be burdened with any  
22 of the expenses.

23 That is his lawsuit.

24 When we made our remarks at the close of the  
25 plaintiff's evidence, your Honor made two rather pertinent

1 6 rgmch

2 points clear, the first being, well, was there materiality  
3 in the question of whether the expenses were in fact to  
4 be charged to Dr. Stern. I would submit to your Honor  
5 at this point that the issue of materiality is no longer in  
6 issue at all. It is obvious that it was a material factor.  
7 They disagreed about it constantly. Dr. Stern bridled  
8 about it on September 3rd. Indeed, the expenses have  
9 been almost equal to the revenue, so from every conceivable  
10 standpoint, the treatment of the expenses was a material  
11 factor, is a material factor, really is the most important  
12 factor at bar between these parties.

13 Now, for Dr. Stern to prevail on this rather  
14 rigid construction -- and again, your Honor, if I might be  
15 indulged, your Honor said at the time of our original  
16 motion, "Maybe it's Dr. Stern's position that there was  
17 to be a later agreement to cover these expenses. Maybe  
18 the agreement of these parties was simply incomplete,  
19 not divided, not in disagreement, but incomplete as to the  
20 expenses."

21 I would submit now, your Honor, under the state  
22 of the record, that's not a sustainable position. It is  
23 Dr. Stern's position that the agreement was complete, there  
24 was to be no further agreement, and he is right about it.

25 Now, your Honor, that brings us directly to the

1 6a rgmch

2 issue which is the only way Dr. Stern can prevail, of  
3 whether the parties had an agreement that he, Dr. Ste 1,  
4 was not to be charged with the expenses, despite the  
5 clear language in the agreement which states, "All  
6 expenses for the project advanced by Satra are to be  
7 recouped out of earnings."

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2 Now, Dr. Stern, from the standpoint of a motion  
3 for a directed verdict, is the only witness to be considered,  
4 I think, by your Honor. Dr. Stern's position on that has  
5 been very clear to me. It's been clear to me throughout,  
6 what his exact position on that subject is. Beginning on  
7 page 92 of the transcript of this trial, Dr. Stern stated  
8 very clearly that he had a meeting on August 31 with  
9 Mr. Mott and Mr. Hermann and that they argued; they wrangled  
10 over the issue of whether he was to be charged with these  
11 expenses. Your Honor, there are several pages of testimony  
12 on this subject. It is absolutely clear under this testi-  
13 mony, just absolutely clear, that Dr. Stern finally said,  
14 beginning now on page 89 at line 18 of the transcript,  
15 Dr. Stern's words on direct were -- not cross, just his own  
16 lawyer talking:

17 "Q What happened next in the discussion?"

18 These are Dr. Stern's words:

19 "All right. I then said -- I understand what  
20 you are talking about, telling Mott and Hermann. I see  
21 what you are trying to tell me that you want to charge me  
22 with these expenses. I have an agreement with Ara Oztemel.  
23 I am not going to agree to anything. I will be seeing him  
24 later on in the day. Let me think about this. I will dis-  
25 cuss it with him."

1 2rgd

2 The parties absolutely had balked on the meeting  
3 of those terms; and whether these expenses were cumulative  
4 or not and the extent he would be charged them.

5 Now, it is equally clear from Dr. Stern's  
6 testimony that he had no binding agreement as of that time  
7 and that his agreement was made with Oztemel late in the  
8 afternoon, as I recall, on August 31. Now, the significant  
9 portion of that, your Honor -- sometimes I have been told  
10 it's unfair, but I am going to read what your Honor asked  
11 the witness while the witness was on the stand because you  
12 got to the thing very quickly and I think correctly.

13 The Court said on page 331, line 13:

14 "Wait a minute, Doctor. Don't get so excited.  
15 I also understood that on September 3, or whatever day it  
16 was that you met with Mr. Mott to go over this proposed  
17 document, Exhibit Z, you did talk about the expense reimbursement  
18 there because you told him you disagreed with the  
19 proposal."

20 The witness said, "That's correct."

21 The Court said, "In addition to that, as  
22 Mr. Hill has just brought out, you and Mr. Mott and others  
23 also discussed the question of expense reimbursement on  
24 August 31, and in particular the schedule which was attached,"  
25 going back again to the meeting with Mott and Hermann on the

2 31st.

3 The witness said, "We discussed it on the  
4 morning of the 31st applicable to the earlier agreement."5 Then, your Honor, comes the crux of the whole  
6 lawsuit. The witness continues at line 4, page 332:7 "It happens they added it to the August 31  
8 agreement. There was no discussion at the time of them  
9 having added it to the August 31 agreement. I merely  
10 accepted it as it was."11 Your Honor, that's not a comment. That's not  
12 a comment. It is perfectly obvious that there were a  
13 constant series of arguments about it. It is perfectly  
14 obvious that it was a considerable factor. It is perfectly  
15 obvious that Mott insisted it was cumulative and Stern  
16 insisted it was not. It is the plaintiff's testimony that  
17 when the agreement was signed it was added to by Satra at  
18 Satra's request in a form that had been prepared and  
19 bargained over by Mott and he submitted it the way it was.20 We submit, your Honor, that it is not a ~~juris~~.21 THE COURT: Gentlemen, as you may already be  
22 advised, your comments were both interesting and very  
23 enlightening. I think there are serious questions of fact  
24 and they must go to the jury. Both motions are denied.  
25 I will reserve decision, however, on Mr. Hellerstein's

1 4rgd

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2 motion with regard to whether the first affirmative defense  
3 should be stricken and I will, of course, give you plenty  
4 of advance advice as to what my position is, or at least  
5 adequate advance advice.

6 Mr. Hellerstein, are you going to put any  
7 further proof in?

8 MR. HELLERSTEIN: The only thing I would like  
9 to do, your Honor, is we made a copy of that blackboard  
10 chart. I suspect -- we marked it for identification. I  
11 suspect it should probably be in evidence.

12 THE COURT: You mean the copy?

13 MR. HELLERSTEIN: Yes. I would like to move  
14 that copy into evidence. It is EEEE, your Honor.

15 MR. HILL: No objection.

16 THE COURT: All right, Plaintiff's Exhibit EEEE  
17 is received in evidence.

18 (Plaintiff's Exhibit EEEE was received in  
19 evidence.)

20 MR. HELLERSTEIN: The plaintiff rests.

21 THE COURT: Off the record for a moment.

22 (Discussion off the record.)

23 THE COURT: I intend to tell the jury that the  
24 only issue before them will be whether or not the plaintiff  
25 and the defendant entered into a valid contract and whether,

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2 if they did, that contract was induced by the plaintiff's  
3 misrepresentation and fraud. Those, as I see it, are the  
4 only two issues at this time for the jury. Obviously  
5 there are a great many instructions that have to be given  
6 to them in regard to those issues, but those are the issues.

7 All right. Could you call in the jury now,  
8 please.

9 (Jury present.)

10 THE COURT: Ladies and gentlemen, we have come  
11 to the conclusion of the presentation of evidence. The  
12 only thing I want to report to you is that during your  
13 absence, the parties, by agreement, introduced into  
14 evidence one further exhibit, which is simply a copy of the  
15 chart that Dr. Stern drew for you on the blackboard so that  
16 you can look at it if you wish to during your deliberations.

17 Now, you will remember that I told you at the  
18 beginning of the case that after all the evidence had been  
19 submitted Mr. Hellerstein and Mr. Hill would sum up for you;  
20 that is, they would wrap up their view of the case in a  
21 narrative form to you, and after that I will instruct you as  
22 to the law to be applied in this case and then you will  
23 deliberate on the case.

24 Unfortunately I have not had a chance to complete  
25 the preparation of my charge and perhaps counsel want a

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2 AFTERNOON SESSION

3 (2:15 p.m.)

4 (In the robing room.)

5 THE COURT: I called you in to give you my  
6 rulings.7 I am denying the plaintiff's motion to strike  
8 the first affirmative defense. I don't expect to make a  
9 big thing of it in my charge, but I think you are free to  
10 argue it to the jury, and I do have something about it in  
11 my charge.12 Now, on the requests to charge, it is difficult  
13 for me to be entirely accurate about my rulings here  
14 because there is an awful lot of overlapping between you,  
15 understandably, and I am not quite sure without taking a  
16 long time to pore over precisely which version I used in  
17 each instance. But I have tried to indicate where I have  
18 approved things in principle, or where I know that I've  
19 adopted something I'll try to tell you, and where I have  
20 rejected it, I'll certainly tell you.21 I have adopted the plaintiff's revised conten-  
22 tions of the parties, except that I have inserted a fairly  
23 lengthy statement of the contentions of the defendants,  
24 which I believe Mr. Hill will find accurate, to balance out  
25 the contentions given by Mr. Hellerstein.

2 I have adopted the principle relating to burden  
3 of proof stated in plaintiff's requests to charge, that is,  
4 that the plaintiff has the burden of proving by a preponder-  
5 ance of the evidence and the defendant has to prove by  
6 clear and convincing evidence that there is fraud, etc.

7 Now referring to Item No. III, the first item  
8 having to do with the irrelevance, let's call it, of  
9 hopeful puffing and so forth, I have stated in one of the  
10 instructions I've given that they must find there was a  
11 misrepresentation of fact and not merely of opinion or  
12 prediction.

13 I have adopted the list of elements set forth  
14 by the plaintiff in the middle of page 6. I have then gone  
15 on on the whole to utilize the statements, somewhat modified,  
16 of the defendants as to the detail of such elements, and I  
17 will comment more on that when I get to referring to the  
18 defendants' requests to charge.

19 I grant No. IV in principle.

20 On V through the bottom of page 8, I have not  
21 adopted the language at the bottom of page 8, but I have  
22 adopted the language at the top of page 9.

23 On the supplemental requests to charge, I am  
24 granting all of them.

25 Now we come to defendants' requests.

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2 Starting with the original requests, Request  
3 No. 1 is granted.

4 Request No. 2 is granted in principle. I do  
5 charge the jury that they must find that Dr. Stern did what  
6 he said he would do or, putting it another way, that you  
7 got what you bargained for.

8 No. 3 is granted in principle.

9 No. 4 is granted in principle, but, as I've  
10 indicated, I've used the plaintiff's list instead of your  
11 list.

12 No. 5 is granted in edited form.

13 The same is true of 6 and 7.

14 No. 8 is granted in principle.

15 No. 9 is granted in principle.

16 No. 10 is not applicable any longer because  
17 you've indicated, the plaintiff indicated they are not  
18 raising the question whether the actions of the defendants  
19 were taken within a reasonable time.

20 I find No. 11 not to be applicable because I do  
21 not find sufficient evidence in the record to support the  
22 implication or suggestion that if Dr. Stern made a mis-  
23 representation it was made innocently, so to speak, or  
24 without intent to deceive.

25 I believe that he has been directly charged with,

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2 and that all I should charge the jury is that he has been  
3 directly charged with, intending to deceive, and I decline  
4 to charge No. 11.

5 MR. HILL: May we have an exception to that,  
6 your Honor?

7 THE COURT: Of course.

8 I believe the rest are not applicable. Well,  
9 No. 12 refers to damages.

10 MR. HILL: Right, right.

11 THE COURT: And the remainder refer to  
12 Mr. Stafford.

13 MR. HILL: Right.

14 THE COURT: Now, with regard to your supplemental  
15 requests, No. 1 is granted in principle, but I revised it  
16 to be considerably shorter.

17 No. 2 is granted in principle, and I also  
18 revised that to be considerably shorter.

19 I reworded No. 3, but it is granted in principle.

20 I think that takes care of it, gentlemen. I  
21 hope that I have accurately stated the situation. But, of  
22 course, you can always ask me to clarify it after my charge,  
23 if that seems necessary.

24 I am ready to go, if you are. But let me ask  
25 you this:

2 Mr. Hellerstein, are you still proposing that  
3 this sheet should be given to the jury (indicating)?

4 MR. HELLERSTEIN: No.

5 THE COURT: All right. Very good.

6 MR. HILL: I wonder if it would be appropriate  
7 for me to ask whether it is your Honor's intention to charge  
8 and give this thing to the jury today?

9 THE COURT: I do hope to do so, because I have  
10 a meeting at 9:30 tomorrow morning and a hearing at 10:00.  
11 I don't, on the other hand, expect, for a case like this,  
12 however important it may seem to other people, to stick  
13 around here after hours. I would bring the jury back in  
14 the morning to sit.

15 We'll play it by ear, but I hope to be able to  
16 charge today.

17 MR. HILL: Mr. Simon just asked me about the  
18 issues that go to the jury. I take it the issues that go  
19 to the jury are, one, is there an agreement, a contract?;  
20 two, was it fraudulently induced and was there a failure of  
21 consideration.

22 THE COURT: That's right, but I am not going to  
23 put special questions to them.

24 MR. HILL: No.

25 THE COURT: Those are the issues that I will

2 tell them are in the case.

3 (In open court, jury present.)

4 THE COURT: Ladies and gentlemen, the floor is  
5 about to be given to counsel to address you. I just want to  
6 remind you that, as I told you at the outset of the case,  
7 whatever Mr. Hill or Mr. Hellerstein have to say about the  
8 case, and I have no reason to believe they won't be accurate,  
9 their statements do not constitute evidence. You've heard  
10 all the evidence now.

11 The purpose of their statements is to give you  
12 their point of view so you can put everything in perspective  
13 and, when the time comes, decide the case for yourselves.

14 Mr. Hill.

15 MR. HILL: Your Honor, ladies and gentlemen,  
16 this has been kind of a long week and I'm sure that you are  
17 as glad as we are that it has finally reached this point,  
18 where we will put to you the questions which we think have  
19 been raised in this matter.

20 I just want to take this opportunity to thank  
21 you for your attention. It is not easy in these courtrooms  
22 to stay awake. With all due respect to the federal court-  
23 house, the facilities are something less than adequate for  
24 people to try to pay attention, which I know you all have  
25 tried to do.



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2 money would have been paid under the 1971 agreement.

3 There were additional payments under agreement, and this  
4 is also referred to in that same exhibit, under a 1973  
5 contract, and even that sum of money comes to an additional  
6 \$180,000.

7 Now this, ladies and gentlemen, is made in the  
8 context -- and this really brings me to what at least  
9 we consider to be -- when I say "we," what the defendants  
10 consider to be one, really two, although there are three  
11 issues -- but certainly one of the two key issues in the  
12 case: Was there an agreement on August 31, 1971?

13 Now, that issue really turns on a factual  
14 question, and that factual question is: Had Satra, acting  
15 through Mr. Oztemel, Mr. Mott, Mr. Hermann, those are all  
16 names that you remember, reached an agreement on the  
17 expenses that were going to be charged against Dr.  
18 Stern's -- or I should say, the expenses to be charged  
19 against the monies received from IBM before Dr. Stern got  
20 to share fifty-fifty? You will all remember this testimony,  
21 but I want to go back to it.

22 It is our position, and I think his Honor will  
23 charge, that unless the parties had reached full and total  
24 agreement on the subject of how the expenses were to be  
25 charged under the August 31st agreement, in other words,

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2 unless Dr. Stern and Satra acting through its people had  
3 reached total agreement with respect to how those  
4 expenses were to be shared, there simply was no agreement.

5 Now, I don't ask you to recollect any testimony  
6 other than that given by Dr. Stern on this issue. Mr.  
7 Mott and Mr. Oztemel were perfectly clear when they said  
8 there was no agreement. Now, they are interested parties;  
9 we recognize that. I don't suggest for a minute that you  
10 do anything other than believe them. But I recognize that  
11 they are interested parties and you can resolve this  
12 question, this factual question, for yourselves based  
13 solely on Dr. Stern's testimony.

14 Why can you do it? How can you do it? There  
15 are two separate place in the record. One of them runs  
16 from about Page 80 through Page 95, and then there is  
17 another section at Page 330, 331, where this very issue  
18 is raised in the testimony, and it is perfectly clear that  
19 what Dr. Stern testified to is true.

20 And what did he testify to? You may recall that  
21 he testified that on the 31st he had a discussion with  
22 Mott and with Hermann, the lawyer and the accountant for  
23 Satra. They told him that it was their understanding  
24 that these expenses were to be cumulative, that they were to  
25 be accumulated through the period of the contract, and when

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2 revenues were realized, the cumulative expenses were to  
3 be charged.

4 Dr. Stern took the position with them at this time,  
5 as he has done in this courtroom, that, no, that wasn't  
6 the way the agreement was to be done, that he was only to be  
7 charged expenses on the schedule if there were revenues  
8 realized in that year, and as you pass out of a year  
9 in which no revenues have been realized, then the expenses  
10 for that year were to be ignored, wholly apart from the  
11 reasonableness of that kind of agreement, and he went on  
12 to say that the meeting with Mott and Hermann was  
13 adjourned without an agreement having been reached, that  
14 he had a further discussion with Oztemel that afternoon,  
15 the subject was not discussed, and his very testimony is that  
16 they, referring presumably to Mott, Hermann and/or  
17 Oztemel, had added the schedule to the agreement without his  
18 having agreed with them as to what it meant.

19 Now, if you believe Dr. Stern and his testimony  
20 on this issue, I would urge you that there simply cannot  
21 be an agreement. Certainly, nothing could have been more  
22 material than this question of the expenses. You heard  
23 Mr. Oztemel testify to the effect that, in the course of  
24 conversations with his people, where they were trying to  
25 estimate what it was going to cost to service an agreement

2 with IBM, that in their own conversations they said,  
3 "Look, IBM is of the size it is." I'm sure I don't have to  
4 tell you how big IBM is, "when IBM starts to send people  
5 into Russia," and you remember the listing of the various  
6 exhibits of the things that Satra was supposed to do,  
7 it becomes very clear that, again viewing this from the  
8 standpoint of reasonableness, that when Mr. Oztemel testified  
9 to the effect that their estimate was a hundred thousand  
10 dollars a year, that that was a reasonable estimate of the  
11 expenses, and indeed that's what shows in the schedule  
12 attached to what in this case is the famous Plaintiff's  
13 Exhibit C, called the proposal letter.

14 Now, Dr. Stern has testified, notwithstanding  
15 all of this, he had an agreement, that the parties had a  
16 meeting of the minds. What, what is the history of this  
17 Stern-Satra relationship? It has been testified to at  
18 great length. The August 13th document, the August 25th  
19 document, the August 31st document, followed by the  
20 September 3rd document, as to which there has been much  
21 testimony, followed by a contract prepared a draft of a  
22 contract prepared by Dr. Stern's lawyer, Mrs. Hauser.

23 The history of this relationship was one of  
24 proposal and counterproposal. I think that that's what comes  
25 out of all of this testimony. Certainly, it is clear that

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2 even Dr. Stern, although there has been some testimony  
3 from him on the issue, never himself thought he had an  
4 agreement prior to August 31st, and you may remember his  
5 deposition testimony in that regard.

6 This was a constant process of back and forth  
7 and back and forth, and I think that given the testimony  
8 as to what happened on the 31st, then the testimony of  
9 Mr. Mott as to what happened on September 3rd when he  
10 prepared that next draft, the exhibit number of which I have  
11 now forgotten, you may recall there was testimony from Dr.  
12 Stern that this represented renegotiation of the agreement.  
13 It cannot be renegotiation of the August 31st agreement,  
14 we submit, if it is a fact that on August 31st the parties  
15 had not come to a complete understanding with respect to what  
16 was to be done with these expenses and how they were to  
17 be charged.

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2 Again, the September 3rd contract is simply  
3 a natural result, if you like, of the continuing discussions  
4 between these parties, between the Satra people, various  
5 of the Satra people, and Dr. Stern, and it cannot be, I think,  
6 in any reasonable way, considered to be renegotiation.

7 Indeed, you might ask yourself this question:  
8 If Dr. Stern was as exercised, was as mad, if you like,  
9 at Mr. Mott, as he tells us -- you may recall his testimony  
10 that he suggested to Mr. Mott that he was renegotiating,  
11 that he had no right to do this, and that he was, as I  
12 say, mad about it, and that Mott's reaction was to,  
13 I think, "charge out of the room without saying anything."  
14 there is no testimony in this record that on  
15 September 3rd, or at any time, until a much later period  
16 of time -- I believe it's late October or November --  
17 did Dr. Stern ever raise the question with Mr. Oztemel.

18 Now, I put it to you, ladies and gentlemen:  
19 Is it reasonable if what you thought you had on August 31st  
20 was a contract in which you had a possibility of receiving  
21 millions of dollars and you had been told by company  
22 counsel, the company's lawyer, that the agreement wasn't  
23 what you thought it was, would you have waited, would  
24 anyone have waited for two months before going to the boss,  
25 Oztemel? I submit to you that Dr. Stern didn't think he

1 2 rgmch

2 had an agreement at all on September 3rd, or otherwise  
3 he would have acted differently than he had.

4 Now, again, I think you must ask yourself this  
5 question, again trying to determine whether there was  
6 an agreement here, again: Is it reasonable? There has  
7 been much testimony in this record about a partnership,  
8 fifty percent and so on and so on and so on. Whatever that  
9 was, and it is whichever you believe.

10 Let's again go back to the question of expenses.  
11 Is it reasonable to believe that, faced with the prospects  
12 of millions of dollars of profits of income, that Satra  
13 would have agreed, or indeed I will put it to you another  
14 way: That Dr. Stern wouldn't even have proposed  
15 that he, in effect, get fifty percent off the top, because  
16 that's really what he is talking about; he is talking about  
17 fifty percent off the top.

18 Now, reasonable, experienced business people just  
19 don't make those kinds of commitments, and indeed the  
20 testimony here is that Satra didn't make that kind of  
21 commitment, and on Dr. Stern's own testimony they didn't  
22 make that kind of a commitment, because he said there  
23 was not an agreement on this issue.

24 Now, I suggest to you that there is no partner-  
25 ship indeed that provides that one partner gets fifty

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2 percent of the gross, pays none of the expenses, and the other  
3 partner gets fifty percent of the gross but he bears  
4 all the expenses, whatever they may be.

5 I suppose the issue here is not whether you think  
6 it's fair or unfair. The issue on this particular point is  
7 whether or not there was, in fact, an agreement. I  
8 submit to you the undisputed testimony of Dr. Stern  
9 himself; ignore if you like, Mr. Mott's testimony,  
10 Mr. Oztemel's testimony. There was simply no agreement  
11 that gives rise to any rights on the part of Mr. Stern.

12 Let me turn now to the second major issue in the  
13 case. This is a somewhat more complex issue and it  
14 requires reference to, I think, something more of the  
15 record than really the -- I guess it isn't more than ten  
16 or fifteen pages that I refer to out of a record which now  
17 must run close to a thousand typed pages.

18 The defendants took the position at the outset of  
19 this trial that Dr. Stern was able to get Mr. Oztemel  
20 to sign the document dated August 31st because Oztemel  
21 and his people at that point in time believed that Stern  
22 was able to bring to Satra IBM as a client. Now, you are  
23 going to have to determine, if, but only if, you decide  
24 that there was an agreement between the parties -- you  
25 will only get to this question in your deliberations if you



2 MARVIN STERN

3 v.

72 Civ. 143

4 SATRA CORP. and SATRA CONSULTANT

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April 9, 1974  
9:45 a.m.

7 (Trial resumed, in the robing room.)

8 THE COURT: The Court has suggested that we  
9 proceed without the alternate juror, who is the only  
10 person missing, since he will be dropped from the proceedings  
11 immediately after the reading of the charge, and I under-  
12 stand counsel have no objection to my doing so.

13 MR. HILL: No objection.

14 MR. HELLERSTEIN: No objection.

15 (In open court; jury present.)

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er, J.

## 2 CHARGE OF THE COURT

3 THE COURT: Good morning, ladies and gentlemen  
4 of the jury. My remarks are addressed solely to you this  
5 morning, and I hope you will give me solid attention, I  
6 am sure you will, because you have got all the facts now,  
7 but the question is what rules do you apply in order to  
8 determine whether or not this case should be decided in  
9 favor of Dr. Stern or of Satra Company.

10 You are about to undertake your final function  
11 as jurors, and that is to decide the fact issues. You  
12 are the sole and exclusive judges of the facts. You pass  
13 on the weight of the evidence, you determine the credibility  
14 of the witnesses, you resolve whatever conflicts you believe  
15 there are in the evidence, and you draw such reasonable  
16 inferences as may be warranted by the testimony.

17 By the way, ladies and gentlemen, I am going  
18 to interrupt myself to say that it has become the custom,  
19 in a court like this anyway, because of the importance of  
20 the cases here, among other reasons, for the judges to  
21 prepare their charges in writing, and it is for that reason  
22 that I am reading my charge, although I would much prefer  
23 to converse with you directly, as I am doing at the moment.

24 If, as the result of reading the charge, I go too  
25 fast, which I sometimes have a tendency to do, or for any

2 reason you can't understand what I'm saying, would you  
3 please raise your hand and I'll be glad to slow down or  
4 elucidate.

5 My function at this stage of the trial is to  
6 instruct you as to the law, and it is your duty to accept  
7 these instructions as to the law and to apply them to the  
8 facts as you find them In your determination of the facts  
9 you rely upon your own recollection of the evidence.  
10 Anything that counsel may have said as to a fact during the  
11 course of the trial or in his summation, or indeed anything  
12 the Court, that is, I, may have said or may refer to in  
13 these instructions as to a fact is not to be taken in sub-  
14 stitution of your own independent recollection of the  
15 evidence.

16 Now, to wrap the situation up for you, I'm going  
17 to state what I understand to be the contentions, or the  
18 positions, of the two parties here. I hope this will help  
19 to put things in perspective, but I want you to understand  
20 I am not sponsoring these contentions. I am just  
21 repeating to you what I understand the parties to argue.

22 Dr. Stern has brought this action for a declaratory  
23 judgment. He asks this Court to declare that he has a  
24 valid and binding agreement with defendant Satra Corporation  
25 and Satra Consultant Corporation, and that the defendant

2 should be directed to abide by the agreement and to pay  
3 the plaintiff all monies due and coming under the agreement.

4 Let me interrupt myself to say that although Dr.  
5 Stern is asking that the defendants be directed to pay  
6 to him all monies due to him, you are not being asked and  
7 will not be asked to determine what the sums due him are  
8 but only the question of whether he has a valid, binding  
9 contract, and hereafter we will determine, if your decision  
10 is that he does, how much is owed to him.

11 Dr. Stern contends that prior to September 1,  
12 1971 he introduced defendant Satra Corporation to IBM  
13 World Trade Corporation and arranged various meetings between  
14 Satra and IBM to discuss the hiring of Satra to act as  
15 IBM's consultant with respect to engaging in business in  
16 the Soviet Union.

17 He further contends that during the course of  
18 discussions between IBM and Satra, and on September 1, 1971,  
19 he and Satra entered into a written agreement whereby he  
20 was to receive fifty percent of the revenue which might be  
21 received in the future by the defendant Satra from IBM;  
22 that Plaintiff's Exhibit C in evidence is a copy of the  
23 written proposal offered by Satra to plaintiff and that  
24 Plaintiff's Exhibit D in evidence is a copy of Dr. Stern's  
25 acceptance of Satra's proposal, and that Plaintiff's

2 Exhibit E in evidence is a guarantee of that agreement  
3 by the defendant Satra Consultant Corporation.

4 Dr. Stern further contends that after the dis-  
5 cussion of his agreement with Satra on September 1, 1971,  
6 he assisted in negotiating with IBM and helped obtain  
7 for Satra, on September 22, 1971, written agreements  
8 between IBM and Satra, which agreements have been  
9 marked Plaintiff's Exhibits H, I and K in evidence; that  
10 the agreements with IBM provided for payment to Satra  
11 of a consulting fee based on 3-1/2 percent of all data  
12 processing equipment and 7-1/2 percent of all office  
13 equipment sold by IBM in or to the Soviet Union over a  
14 five-year period; that in accordance with the agreements  
15 between IBM and Satra, or or about October 12, 1971 IBM  
16 paid to Satra an initial advance of \$25,000 and that Satra  
17 in turn paid the plaintiff fifty percent thereof, or  
18 \$12,500, in accordance with the terms of the agreement  
19 between plaintiff and Satra; that thereafter, in November  
20 1971, Satra demanded that unless Dr. Stern renegotiated  
21 his contract and accept less than was due him under the  
22 contract Satra would not consider its contract with him  
23 binding and no further payments would be made to him, Dr.  
24 Stern argues; that on December 22, 1971 IBM paid to Satra  
25 another \$25,000 advance and Satra refused to pay to Dr.

2 Stern fifty percent of that advance.

3 Dr. Stern argues that Satra admits that it entered  
4 into the agreement with plaintiff, with him, that is, by  
5 signing Exhibit C in evidence, and that Dr. Stern introduced  
6 Satra to IBM to help negotiate the contract with IBM,  
7 obtained IBM's signature on the contract between IBM and  
8 Satra, and is entitled to compensation for his services.

9 Now I have finished describing Dr. Stern's  
10 contentions and I am coming to Satra's contentions.

11 Satra - and I call both corporations Satra,  
12 Satra Corporation and Satra Consultant, because for all  
13 practical purposes they are one here - Satra, as you  
14 know, views the matter quite differently. Satra puts forth  
15 several reasons why it believes Dr. Stern is not entitled  
16 to recover on the contracts. The first is that no contract  
17 ever existed between it and Dr. Stern because, Satra  
18 contends, there was never a meeting of the minds between  
19 Satra and Dr. Stern as to precisely what their agreement  
20 was.

21 The second contention of Satra is that even if you  
22 find that Plaintiff's Exhibit C and Plaintiff's Exhibit D  
23 did constitute a valid and binding contract, Dr. Stern is  
24 nevertheless not entitled to recover because, says Satra,  
25 he brought about the agreement between himself and Satra

2 by what Satra claims was misrepresentation or fraud.

3                   Specifically, Satra claims that Dr. Stern held  
4 himself out as having special influence and special expertise,  
5 without which Satra could not secure a contract with IBM,  
6 whereas in fact, as Satra contends, Dr. Stern had no  
7 special influence or expertise whatever to enable him to  
8 bring about an IBM agreement. Indeed, Satra argues that  
9 its contract with IBM was not brought to fruition because  
10 of anything that Dr. Stern did and therefore, as a sub-  
11 ordinate and third argument, Satra claims that it did not  
12 get what it bargained for and under all the circumstances  
13 it has the right to rescind, or break, the contract with  
14 Dr. Stern even if you find that that contract was originally  
15 valid and binding.

16                   I am coming now to tell you who has the burden,  
17 or responsibility, of proving the various things that we  
18 are talking about. The plaintiff has the burden, or  
19 responsibility, of proving by a preponderance of the  
20 evidence that an agreement was entered into between himself  
21 and Satra in the form set forth in Plaintiff's Exhibits C  
22 and D. By now I'm sure you know they are the documents  
23 of August 31st and September 1st.

24                   Let me explain to you the phrase "a preponderance  
25 of evidence." It means simply that the evidence on this

2 issue must be more convincing or persuasive to you than  
3 the evidence opposed to it. In other words, for Dr.  
4 Stern to establish that the contract was valid and binding  
5 he must present to you evidence which you believe is more  
6 persuasive than the evidence on the other side.

7           What I've told you so far relates to the proof  
8 of the contract itself. On the other hand, as to Satra's  
9 claim that Dr. Stern fraudulently induced it to enter into  
10 the contract, in order to prevail Satra must prove that  
11 point to your satisfaction by clear and convincing evidence.

12           If you find that Dr. Stern has proven by a  
13 preponderance of the evidence that there was a valid contract  
14 between himself and Satra, then in order to defeat Dr.  
15 Stern's claim the essential elements which must all be  
16 proven by clear and convincing evidence by Satra are  
17 as follows; in other words, in order for Satra to knock  
18 the contract out of the box, if you find that there was a  
19 good contract, Satra must prove all of the following items  
20 by clear and convincing evidence. They are:

21           First, that Dr. Stern made representations to  
22 Satra of facts and that the facts were not merely his  
23 opinions or expectations;

24           Second, that such representations of facts were  
25 not true;

2                   Third, that Dr. Stern knew that they were false,  
3                   or not true;

4                          Fourth, that the representations which he  
5                          made which were untrue were what we call material, and  
6                          I'll explain to you in a moment what that means;

7                   And, finally, fifth, that Satra relied on the  
8 representations and entered into the agreement with Dr.  
9                   Stern in the light of it and because of it. I will  
10                  now discuss each of these elements.

11                   A misrepresentation is a communication by words or  
12 other conduct by one person to another that under the  
13 circumstances amounts to an assertion not in accordance  
14 with the facts. For example, if you find that Dr. Stern  
15 said he had influence with IBM and he did not, you may find  
16 that he made a misrepresentation. Or, if you find that  
17 Dr. Stern said the relationship between him and Satra was  
18 essential to Satra's being able to get IBM as its client,  
19 and that was not true, you may find that Dr. Stern made a  
20 misrepresentation. Of course, as I have said, you must  
21 find not only that such representations were not true but  
22 that Dr. Stern knew they were not true.

23 Now, there has been conflicting testimony as to  
24 exactly what statements Dr. Stern made to the Satra  
25 personnel. In determining what statements were in fact made

2 by Dr. Stern, you may, and you should consider all the  
3 circumstances leading up to and surrounding the exchange  
4 of memoranda between Satra and Dr. Stern August 31st and  
5 September 1st, respectively, including whether in your  
6 judgment Satra would have entered into the agreement in  
7 question if Dr. Stern had not in fact made the statements  
8 which you find that he did make.

9 Next. Even if you decide that Dr. Stern made one  
10 or more misrepresentations, you must still decide whether  
11 they were of a material fact or facts. A material fact  
12 is a fact to which an average, reasonable, prudent person  
13 would attach importance in determining a course of conduct  
14 to be taken or followed upon learning that fact.

15 Therefore, if you find that he made such a  
16 statement and that an average man would pay attention to it  
17 and regard it as important, then you would find that that  
18 was a misrepresentation of a material fact. On the other  
19 hand, if you find that an average man would not attach  
20 importance to whatever statements you find Dr. Stern to  
21 have made, then the statement would not be material and  
22 you would decide in Dr. Stern's favor on that issue.

23 The next question you must decide is whether, if  
24 you find that Dr. Stern did make misrepresentations of  
25 material facts, he made them intending to deceive Satra.

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2 If you find that Dr. Stern made a material misrepresentation  
3 knowing that the statement he made was false, you would  
4 find that he intended to deceive Satra. Furthermore, even  
5 if you were to find that Dr. Stern made the misrepresentation  
6 without knowing whether it was true or false but pretending  
7 that he had exact knowledge of the situation when he did  
8 not, you can find that he intended to deceive Satra.

9 The next question you must decide concerns the  
10 element of reliance. To allow Satra to rescind, or break  
11 its agreement, with Dr. Stern, you must find that the  
12 false representations complained of were relied upon by  
13 Satra when it executed its memorandum of August 31, 1971  
14 and forwarded it to Dr. Stern. Putting it in other words,  
15 you must decide whether Dr. Stern's false representations  
16 induced Satra to enter into the agreement with Dr. Stern.  
17 You do not have to find that the misrepresentations were  
18 the only inducing cause of the agreement being entered  
19 into. It would be sufficient if such misrepresentations  
20 were an inducing cause and Satra relied on it.

21 In determining the question whether Dr. Stern  
22 made a material misrepresentation on which Satra relied,  
23 I want to point out to you that a person to whom a  
24 statement is made is justified in relying on its truth  
25 although he might have learned it was false if he had made

2 his own investigation of the facts. There is no automatic  
3 requirement in law that a party investigating verify  
4 statements which the other party to the contract had  
5 made in the course of their dealing.

6 However, in an arm's length transaction the  
7 allegedly defrauded party must exercise ordinary care for  
8 the protection of his own interests and is charged with  
9 knowledge of all facts which would have been uncovered by  
10 a reasonably prudent person similarly situated.

11 Now, finally, you must decide in this case whether  
12 Dr. Stern did what he promised to do, or, put another  
13 way, whether Satra got what it bargained for under the  
14 agreement. If Dr. Stern did not do what he promised to do  
15 so that Satra did not get what it bargained for, then  
16 Satra would have no further obligations to Dr. Stern and  
17 you should find in its favor.

18 Now, I believe I've given you all of the special  
19 rules of law which apply to this case, but there are certain  
20 general rules that I want to go over with you. I want to  
21 advise you that both parties are entitled, of course, to  
22 the same fair trial at your hands. I bring this up only  
23 because one of the parties is an individual and one of the  
24 parties is a corporation. And lest any member of the jury  
25 should think that there is any basis for distinguishing

2 between them, I wish to tell you immediately that there  
3 is not. The law does not distinguish between parties on  
4 the basis of whether one is an individual and another  
5 a corporation. All parties, including corporations, stand  
6 equal before the law and are to be dealt with equally.

7 Coming to another subject, there is no dispute  
8 that the contract between the plaintiff and Satra was  
9 prepared by Satra, that is, the August 31st proposal was,  
10 and Dr. Stern's acceptance of September 1st was merely  
11 an acceptance.

12 The law requires that an agreement be interpreted  
13 strictly against the party who drafted it. Accordingly,  
14 if you should find that any provision of the contract is  
15 ambiguous, and I'm not suggesting that you will find that,  
16 but if you should, the ambiguity should be resolved against  
17 the party which drafted it, that is, against Satra.

18 Now, a jury cannot make a new contract for the  
19 parties, and you are not being asked to and you may not make  
20 a new contract for the parties. You must construe the  
21 agreement as made. This is because the parties make their  
22 own bargains and are required to be held to the terms of  
23 their own agreement.

24 The first inquiry, therefore, is what did the  
25 parties intend? If their intent is sufficiently shown by

2 the language employed, it is the jury's duty to enforce  
3 the contract. The law, of course, presumes that the  
4 parties understood the meaning of their contract and that  
5 they had the intention to do what they said. But although  
6 the law does presume that the parties understood the  
7 meaning of the contract, if there was no meeting of the  
8 minds then there was no agreement.

9                   In this connection I point out to you that  
10 Satra claims that there was no meeting of the minds as  
11 to the operation of the expense schedule attached to  
12 Exhibit C. If you find that the expense schedule was a  
13 material part of the agreement and that the parties did  
14 not have a meeting of the minds as to the operation of  
15 the expense schedule, then you should find that there  
16 was no contract between them and you would find in favor  
17 of Satra.

18                   When I say a material part of the contract, I  
19 mean one which was central to and a significantly important  
20 part of the contract.

21                   Finally, I instruct you that if a party is  
22 entitled to rescind the contract - in other words, if  
23 you find that Satra should be entitled to rescind the  
24 contract - because of the misrepresentations of the other  
25 party, its right to rescind is not barred because it

2 may have obtained certain benefits under the contract.

3                   In other words, if you should find that Satra  
4 is entitled to rescission here, its right would not be  
5 barred merely because it cannot return to Dr. Stern the  
6 labor and services that he has already performed, so long  
7 as you find that he has received the reasonable value of  
8 those services. But, and on the other hand, a party to  
9 a contract cannot rescind the contract when it has accepted  
10 the benefits thereunder without reasonably compensating  
11 the other party.

12                   Now finally, ladies and gentlemen, I want  
13 to give you some instructions which I hope will help you  
14 in judging the credibility, or believability, of the  
15 witnesses. Your determination of the issues must be made  
16 on the totality of the evidence, and this depends in  
17 large measure upon how you appraise the testimony of the  
18 witnesses.

19                   How do you determine the facts and appraise  
20 the credibility of a witness? Well, there is no magic  
21 formula, but in your search for the truth you use your  
22 fund of experience or common sense. You have seen the  
23 witnesses on the stand and you have observed their manner  
24 of giving testimony. How did they impress you? Did a  
25 witness give you the appearance of telling a forthright

2 and truthful story?

3                   In substance, what you really do is to size up  
4                   the person and act accordingly. In everyday life you are  
5                   often called upon to judge the dependability of the  
6                   statement made to you by other people and you do it by  
7                   determining how it fits in with everything else you have  
8                   heard, how sensible it appears to be, whether there is any  
9                   motive by a person to tell something other than the truth,  
10                   whether the person appears to be a dependable person  
11                   otherwise.

12                   You obviously take into account the interest of  
13                   a witness. The plaintiff, Dr. Stern, is an interested  
14                   witness, and so in my opinion is Mr. Oztemel. They  
15                   are the principals here. But you may also find that other  
16                   witnesses for Satra are interested in the outcome of this  
17                   case because of their present or past association with  
18                   Satra and the connections that they had with the transactions  
19                   at the time that they occurred.

20                   An interested witness is not necessarily unworthy  
21                   of belief, of course. His interest is merely a factor  
22                   which you may, and in my opinion should consider in  
23                   determining the weight and credibility to be given to his  
24                   testimony. Just as you may take any factor into consideration  
25                   which appeals to you in aiding you to decide whether or not

2 one is telling the truth which commands itself to your  
3 belief or which you may find corroborated by other  
4 independent evidence.

5 Now, ladies and gentlemen, under your oath you  
6 were sworn to try this case in accordance with the law  
7 and the evidence and to render a true verdict accordingly.  
8 Each juror is entitled to his or her own opinion, but you  
9 are required to exchange views with your fellow jurors.  
10 That is the very purpose of jury deliberation. That's  
11 what it is all about. Although in order to reach a verdict  
12 either for the plaintiff or for the defendant your  
13 verdict must be, as I believe you know, unanimous.

14 If you have a point of view and if after reasoning  
15 with other jurors it appears that your judgment is open  
16 to question, then, of course, you should have no hesitation  
17 in yielding your point of view, if you are convinced that  
18 the opposite point of view is really the one that satisfies  
19 your own judgment and common sense. However, you should  
20 not give up a point of view that you conscientiously believe  
21 in simply because you are outnumbered or outweighed.

22 Now, ladies and gentlemen, during the course of  
23 your deliberations, if at any time you wish to receive  
24 the exhibits or any of them, or you wish to have any of  
25 the testimony of a witness read back to you, or you have

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2 any questions to put to the Court, your foreman should  
3 only knock on the door and the marshal who is standing  
4 outside the door will convey that message to the Court and  
5 we'll arrange for whatever you wish.

6 I am going to ask Juror No. 1, Mr. Taylor, to act  
7 as your foreman. Mr. Green, the alternate, had not arrived  
8 for this morning's proceedings, but if he had, although  
9 he would have been entitled to sit and listen to my charge,  
10 he would not be entitled to deliberate with you and I  
11 would have to discharge him with thanks at this time.

12 Ladies and gentlemen, I have come to the end of  
13 my instructions to you. I am going to take a moment or  
14 two with the attorneys in the robing room to see if  
15 they believe any points require clarification, which I  
16 hope they will not, and we will return to you momentarily.

17 JUROR NO. 5: Do we have an opportunity to ask  
18 questions at the time of the jury charge?

19 THE COURT: Yes, I think you should so we under-  
20 stand whether there are any sources of confusion in your  
21 mind.

22 JUROR NO. 5: I have several things which are  
23 pertinent exclusively to your charge rather than the  
24 testimony.

25 THE COURT: All right.

2 JUROR NO. 5: One was, in your charge you say that  
3 there is agreement among the parties as to who drafted  
4 the agreement of August 31st, namely, Satra. And my  
5 impression was that certain points of that were intentional  
6 and there was some allegation that, for example, the  
7 word "incremental" was inserted in the agreement by Dr.  
8 Stern and certain other aspects of the agreement.

9 Could you clarify that?

10 THE COURT: I'll clarify that after I have con-  
11 fered with counsel.

12 JUROR NO. 5: Another thing that I am a little  
13 confused on is this: In terms of misrepresenting the  
14 facts as opposed to misrepresenting opinion, if I allege  
15 that this bannister is over six feet tall, I am misrepre-  
16 senting a fact. If I allege that it is the best bannister  
17 I have ever seen, is that misrepresenting a fact or an  
18 opinion or --

19 THE COURT: I don't think that it would be  
20 proper for me to try and specify for you an example there.  
21 I have tried to give you the rule of law. We can't always  
22 make a compartment watertight and you'll have to use your  
23 judgment as to whether, in case you find there was any  
24 misrepresentation, it was a misrepresentation of fact or  
25 whether you believe that Dr. Stern was merely expressing an

2 opinion.

3 I believe that you understand, ladies and  
4 gentlemen, because this subject seems to me to be very close  
5 to lay experience, or ordinary experience, the difference  
6 between deliberately telling somebody an untruth or merely  
7 expressing an opinion which you don't believe - how can  
8 I put it? - in which there is no deliberate intention  
9 to misrepresent.

10 JUROR NO. 5: The last thing that I want to hear  
11 you on is the issue of -- you said on the one hand we should  
12 interpret against the drafting party, and yet on the  
13 other hand there is this matter of what constitutes a meeting  
14 of the minds.

15 And my problem with this issue is that I'm  
16 uncertain from your charge as to whether -- well, to me  
17 these two requests that have been made of us are in a  
18 sense contraposed because if the answer to my first question  
19 is that it is acknowledged that Satra drafted the document  
20 and therefore we must interpret it, any ambiguity against  
21 them, then it would seem to me that they can't argue  
22 that there was not a meeting of the minds if we are --  
23 in other words, there is a difficulty. If we are going to  
24 interpret against them, we can't then say that there was  
25 no meeting of the minds.

2 THE COURT: I don't think that necessarily  
3 follows, sir. But you people will have to decide that.  
4 I just want to be sure that you understand what the rules  
5 are and then you can apply them as you believe they should  
6 be applied to the facts.

7 First, and I haven't said there are any ambiguities,  
8 I am sure you understand that, in the agreement. But if  
9 you should find that a sentence could mean more than one  
10 thing, and if you find that it is a portion of the agree-  
11 ment about which there is no dispute that it was drafted  
12 by one party, then the rule of law is that the meaning  
13 that is favorable to the non-drafting party is the one  
14 that you would adopt.

15 It is also true, as a rule of law, that parties  
16 do not have a contract unless they have a meeting of the  
17 minds, and you will have to decide, when you come to that  
18 point, if you do come to that point, how you bridge the  
19 gap.

20 All right, gentlemen, I'll see you in the robing  
21 room.

22 (In the robing room.)

23 THE COURT: Mr. Hellerstein?

24 MR. HELLERSTEIN: Your Honor, you gave two  
25 illustrations of what might be considered as misrepresentations.

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2 One illustration had to do with something about Dr.  
3 Stern being able to influence IBM. The second one was  
4 an illustration regarding the essentiality of Dr. Stern  
5 to Satra if Satra and IBM would have a contract.

6 I would request that your Honor charge the jury  
7 to find that these could be opinions as well as facts and  
8 that the very statement of this could be interpreted in  
9 another way.

10 Number one, a man if he says he has influence may  
11 in his own mind think that he has someone in his pocket  
12 or he can say that my powers of persuasion --

13 THE COURT: I am agreeable to telling the jury  
14 that they have the right to find that that was an opinion.

15 MR. HELLERSTEIN: All right. That will be as to  
16 both illustrations?

17 THE COURT: Yes.

18 MR. HELLERSTEIN: The second point I want to  
19 raise had to do with that portion of the charge which made  
20 reference to the expense schedule and allowing the jury to  
21 find that if it was a material element and there was no  
22 agreement that there would be no contract, no valid contract.

23 My point is this, your Honor: that I think that  
24 even if the jury found there was no agreement on that  
25 precise point that there nevertheless could be a contract

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2 and the law would give the Court the power to put in something  
3 that was equivalent. The expense schedule had to do with  
4 a certain aspect of expenses, and there are other ways  
5 of treating that particular problem.

6 The central point I am trying to get to is that  
7 the parties can have a partnership and certain detail in  
8 the treatment of expenses could be unclear, yet there still  
9 would be an agreement.

10 THE COURT: Even if that is true, and I'm not  
11 going to try to decide it at the moment, the question is how  
12 to isolate that situation so the Court is in a position  
13 to do anything about it at a later time. I don't see how  
14 you can do anything about it except to ask for a special  
15 verdict on that particular point. Do you?

16 MR. HELLERSTEIN: No. But perhaps -- no, I  
17 don't.

18 THE COURT: I mean, if you want to propose something  
19 along those lines, I am willing to entertain it.

20 MR. HELLERSTEIN: No. I would prefer not to.

21 THE COURT: All right.

22 MR. HELLERSTEIN: The third point had to do with  
23 your instruction on the right to rescind if a party obtains  
24 some benefits under a contract.

25 I think the rule I would request would be that if

2 a party obtained substantially the benefits bargained  
3 for, he cannot rescind.

4 THE COURT: I decline to charge to that effect  
5 not because I think it is necessarily wrong, but because I  
6 have correctly charged already, and I have said, for  
7 example, that if Dr. Stern didn't do what he was supposed  
8 to do or if Satra didn't get what it bargained for, it  
9 could rescind, the implication clearly being that if it did  
10 get what it bargained for - I didn't say that affirmatively -  
11 it could not rescind, and I don't think the word "substantial"  
12 adds anything that would justify my going into the subject  
13 again.

14 MR. HELLERSTEIN: The last point had to do with  
15 the principle of waiver. The testimony showed that Mr.  
16 Oztemel was in a position to know the facts in early  
17 September and did not do anything about it, and I would  
18 regard that as a waiver of any right to rescind.

19 THE COURT: Well, that seems to me a matter of  
20 law for me to determine on the basis of the record.

21 MR. HILL: There is a stipulation, I think, your  
22 Honor. Do you remember when there was some colloquy at  
23 the side bar?

24 THE COURT: There was a question whether it  
25 was a timely action.

2 MR. HILL: That's right.

3 MR. HELLERSTEIN: The stipulation had to do with  
4 the timeliness after Mr. Stafford told him.

5 MR. HILL: Oh, no.

6 THE COURT: I think they are overlapping questions  
7 but different questions. The stipulation had to do with  
8 the acquiescence by the plaintiff in the proposition  
9 that his firing was timely. Am I correct?

10 MR. HELLERSTEIN: In terms of the notice of  
11 Satra.

12 THE COURT: Yes.

13 MR. HILL: No, no.

14 THE COURT: In any event, it does not seem to me  
15 that the point raised by Mr. Hellerstein is something that  
16 should be brought to the jury's attention. I think if you  
17 are right that you will be able still to raise it, should  
18 there be an unfavorable verdict, and I will consider it  
19 at that time.

20 Is that all?

21 MR. HELLERSTEIN: Yes. Except as to what we might  
22 want to do with respect to Juror No. 5. Juror No. 5 asked  
23 some questions.

24 THE COURT: Yes.

25 MR. HELLERSTEIN: Yes.

2 THE COURT: With regard to the thing I said I  
3 would discuss with him when we came back.

4 MR. HELLERSTEIN: I think the third point made,  
5 concerning the possible contradiction between the charge  
6 that a contract should be interpreted against the drafting  
7 party and how that related to the question of meeting of  
8 the minds, was dealt with adequately by your Honor.

9 THE COURT: Yes. I didn't intend to do anything  
10 further. The only one I intend to do anything further  
11 about was the first question he asked, which was what the  
12 extent of an agreement is among the parties as to the extent  
13 to which the August 31st document was drafted by Satra,  
14 because I did accept your proposed charge that there was  
15 no dispute that the August 31st agreement was drafted by  
16 Satra, and that is substantially true, but I'm not certain  
17 that it is a thousand percent true.

18 MR. SIMON: Could we go off the record for a  
19 second?

20 THE COURT: Yes.

21 (Discussion off the record.)

22 MR. HILL: Your Honor, the difficulty I have with  
23 the juror's question is that it doesn't seem to treat  
24 these points in the order in which they ought to be treated.  
25 It seems to me that the issue here is whether or not, as

2 a matter of fact, a meeting of the minds was reached  
3 and particularly with respect to the expenses.

4 THE COURT: Yes.

5 MR. HILL: Now, that's the first issue. If  
6 there was in fact a meeting of the minds, it doesn't make  
7 any difference whether this contract was ambiguous.

8 What I think may happen here is that this jury,  
9 unless they are perfectly clear that there had to be a  
10 meeting of the minds, is going to say: Well, it doesn't  
11 make any difference whether or not there was a meeting  
12 of the minds. This is ambiguous, Satra drafted it,  
13 therefore there was an agreement.

14 And that at least, it seems to me, on the whole  
15 charge and on the juror's question, is now the problem that  
16 is in the case, certainly from our standpoint.

17 THE COURT: I came to the opposite conclusion  
18 on the basis of gut reaction, that is, that the concept  
19 of ambiguity, if it's of any importance from the point of  
20 view of heaven, would be more helpful to the defendant  
21 than to the plaintiff because the juror who asked the  
22 question seemed to equate ambiguity with a lack of meeting  
23 of the minds.

24 But I don't think that we can sit here and  
25 speculate all day what is going on in the juror's mind. I've

2 got to decide what rule I think applies here and what  
3 the facts are, and I am going to solve this problem - I may  
4 not make either of you happy, but I think it is a fair  
5 and proper way to do it - by correcting my charge to the  
6 extent of saying that it may have been inaccurate to say  
7 it was undisputed but that they have the right to find or  
8 not to find, as they choose, that the agreement was drafted  
9 by Satra alone. And if during the course of their deliber-  
10 ations they find that there are any ambiguities and do find that  
11 it was drafted by Satra alone, then I've given them the rule  
12 to go by.

13 MR. HELLERSTEIN: With respect to the word  
14 "incremental," I don't think it is right to say that that  
15 word in isolation should cover the whole spectrum of the  
16 treatment of annual expenditures. If there was a phrase that  
17 went with it in the agreement, with the use of the word  
18 "annual" in the agreement, I think the proper charge  
19 as to that would be that it is for the jury to decide who  
20 drafted what and how it was used.

21 MR. SIMON: Your Honor, may we be heard again  
22 very briefly on this point, because it seems to me  
23 important.

24 The general charge about who drafted the agreement  
25 is very unfair to the defendants. The only thing that matters,

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2 because the only thing the parties were absolutely in  
3 split opinion on was the treatment of expenses.

4 Now, there are only two statements that matter  
5 in the agreement, one of which says all expenses are going  
6 to be recouped out of revenues. We drafted that. We  
7 don't think it is ambiguous.

8 Dr. Stern's testimony very clearly is, one, he  
9 put the word "incremental" in, and two, because he put the  
10 word "incremental" in, and because of the meaning which it  
11 had, the agreement means what he says it means.

12 To create any presumption by drafting against  
13 the defendants on those facts is just unfair.

14 MR. HELLERSTEIN: Mr. Simon, you are wrong for  
15 two reasons. When Dr. Stern put in the word "incremental"  
16 it was after a very thorough exploration of precisely what  
17 Mr. Mott and Mr. Hermann had in mind, and it  
18 was a term that was used in the context of a very lengthy  
19 conversation.

20 And secondly, when Mr. Mott redrafted, renegotiated,  
21 on the September 3rd draft, he knew precisely what was  
22 involved because the change was a change from "incremental"  
23 annual" to "cumulative annual." So he was using the  
24 words with precision as well.

25 I think the only fair charge is to leave the whole

2 thing to the jury.

3 MR. SIMON: That is a fact argument, your Honor.

4 Our suggestion simply is don't create an inference, just  
5 let the jury decide if the parties agreed. Don't put us  
6 under the burden of an inference on ambiguity.7 THE COURT: I don't wish to do so. But, on the  
8 other hand, I have charged on the subject, I have been  
9 asked questions about it on the subject, and I believe  
10 that the rule is not clearly inapplicable to this situation  
11 and I think that the best way to deal with it is to indicate  
12 to them that it is up to them to determine whether or not  
13 the agreement was unilaterally drafted, and they know what  
14 the rule is if they find that is so.15 MR. SIMON: Your Honor, I have one further  
16 comment. My point is that the jury cannot help but believe  
17 that 98 percent of the agreement was drafted by Satra  
18 but the 2 percent that is in dispute was drafted by Dr.  
19 Stern. If the Court would make that clear: if you  
20 find, as to the portion of it where ambiguity is claimed,  
21 that that was the result either of the efforts of Dr.  
22 Stern or half and half, no presumption applies.

23 MR. KILL: That is certainly fair.

24 THE COURT: Yes.

25 MR. HELLERSTEIN: There is no question it was

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2 Dr. Stern's word, but the drafting is different.

3 THE COURT: Wait a minute, Mr. Hellerstein.

4 I am not going to try to decide the facts here. Clearly,  
5 it is reasonable to let the jury know that the question  
6 of ambiguity must apply to the material they are dealing  
7 with --

8 MR. SIMON: That is our point.

9 THE COURT: -- not to the material relating to the  
10 term of the agreement or something of that sort.

11 I will charge that.

12 MR. HELLERSTEIN: If there is ambiguity.

13 MR. HILL: I have another point that I would  
14 like to raise.

15 MR. SIMON: I have one, too.

16 MR. HILL: I have two.

17 THE COURT: All right. Yes?

18 MR. HILL: Your Honor, I think in the early part  
19 of your charge, where you recited the contentions of the  
20 parties, in reciting the contentions of the defendants  
21 I think you stated that it was our position that Dr. Stern  
22 did not have anything to do with the contract between  
23 Satra and IBM.

24 THE COURT: I think I said it wasn't necessary.

25 MR. HILL: I have the word "anything" here in

2 quotes, your Honor.

3 THE COURT: Yes. I said that Satra argues that  
4 its contract with IBM was not brought to fruition because  
5 of anything that Dr. Stern did.

6 MR. HILL: That is just not our contention, your  
7 Honor. We never argued that. And indeed - I mean one place  
8 that I can find it is on Page --

9 THE COURT: What would you like me to say?

10 MR. HELLERSTEIN: It isn't your allegation?

11 MR. HILL: Please, may I finish?

12 I said in my summation on several occasions that  
13 they, Satra, recognized he, Stern, made a contribution  
14 to the IBM situation and they offered him a hundred  
15 thousand dollars.

16 This is very crucial to our case, your Honor,  
17 certainly crucial to our defense.

18 THE COURT: What do you want me to do?

19 MR. HILL: I would like you to tell this jury  
20 that Satra contends, or indeed admits, that he made a  
21 contribution and we offered him a hundred thousand dollars.

22 MR. HELLERSTEIN: If your Honor please --

23 THE COURT: I am not going to discuss the offer  
24 of the hundred thousand dollars, no, and the reason I  
25 stated it as I did is that it doesn't seem to me that it

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2 needs to be taken literally. It meant to me, and I believe  
3 this to be your position, that you could have secured the  
4 contract if Dr. Stern had been nowhere around, and I  
5 think that is really a question the jury has to decide, and  
6 I decline to change it.

7 MR. HILL: In every respect, your Honor?

8 THE COURT: What is that?

9 MR. HILL: In every respect.

10 THE COURT: Certainly I decline to change it  
11 coupled with the offer of a hundred thousand dollars. If  
12 you want me to tell them that it is not literally true  
13 that the defendants claim that he did nothing, I'll be glad  
14 to say that. I don't know if that helps you.

15 MR. HILL: I would request that your Honor would do  
16 that.

17 THE COURT: All right.

18 MR. HELLERSTEIN: If your Honor please, I think  
19 that would place an undue emphasis on one of many contentions  
20 brought by both of the parties. I think we could all quarrel  
21 with particular details, but the overall sense of it seemed  
22 to me fairly to lay out what the respective contentions  
23 were. I think Mr. Hill's allegation in his pleading fairly  
24 supports what your Honor first said.

25 THE COURT: Let me see.

2 MR. HELLERSTEIN: Especially the first affirmative  
3 defense.

4 (Pause.)

5 THE COURT: Suppose I were to put the word  
6 "primarily" in there?

7 MR. HILL: All right. It doesn't really satisfy  
8 me, your Honor. I recognize that your Honor doesn't want  
9 to draw undue attention to the fact that we offered him  
10 a hundred thousand dollars, although we certainly did it,  
11 I hope, yesterday. But we have admitted here that he  
12 introduced them and that he did make a contribution.

13 THE COURT: All right. Supposing I simply say that  
14 you admit that he introduced them and made a contribution?

15 MR. HILL: Fine, your Honor.

16 THE COURT: Is there anything else?

17 MR. HILL: Only one other thing, your Honor,  
18 which I don't want to argue. I just simply want to preserve  
19 the record.

20 We do feel, and particularly now having heard  
21 the entire charge, that the defendant was and is entitled  
22 to a charge on the law of innocent misrepresentation.

23 THE COURT: Yes, I understand that you do, and  
24 I tried to give my reasons for disagreeing with that.

25 MR. HILL: I have nothing else.

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2 MR. SIMON: One final point I am not really clear  
3 that came out.

4 Right at the end of the charge you gave the  
5 instruction in regard to the legal defense of lack of  
6 consideration, and you said, it seems to me, the question  
7 is whether Satra got what it bargained for. It seems to  
8 me the proper rule is whether Satra got what it bargained  
9 for through the efforts of Dr. Stern rather than simply  
10 whether it got something from IBM. I think he had to have  
11 something to do with it.

12 THE COURT: I decline to elucidate on that. I  
13 think that is clear, at least by implication.

14 (In open court; jury present.)

15 THE COURT: There are two or three points which  
16 counsel and I believe that perhaps clarification will be  
17 of some use to you.

18 First of all, with regard to this question of  
19 ambiguity, let me say that it is for you to decide who  
20 you find drafted what portion of the agreement. I think  
21 I overstated it by saying it is agreed that there is no  
22 dispute on the point, although I don't think there is a  
23 dispute as to very much.

24 The second is that, of course, the rule relating  
25 to ambiguity, if you find any, applies only to the subjects

2 within the agreement that you are dealing with at that  
3 time. I mean, let us take the expense question, for  
4 example. You may find that there is ambiguity with regard  
5 to expense but not ambiguity with regard to anything  
6 else, and you don't apply the rule except to the subject  
7 that you are dealing with.

8 That is the first of three points that I have  
9 here.

10 The second is that as examples of alleged misrep-  
11 resentations on Dr. Stern's part I referred to the fact  
12 that Satra claimed that Dr. Stern stated that he had influence  
13 with IBM and that he was indispensable to IBM. I should  
14 point out to you that if you find that Dr. Stern made such  
15 statements, you may find that they were statements of  
16 opinion on his part and not necessarily misrepresented as  
17 fact by him.

18 Finally, I stated that it was Satra's contention  
19 that the contract with IBM was not brought to fruition  
20 because of anything that Dr. Stern did, and counsel for  
21 Satra has pointed out to me that that is not quite Satra's  
22 position, that Satra does admit that Dr. Stern introduced  
23 Satra to IBM and made a contribution.

24 Now, ladies and gentlemen, I have covered all  
25 the points that counsel wanted me to and I ask the clerk

1 jgmch

2 to swear in the marshals and you will go to the jury room  
3 to deliberate.

4 If you want any exhibits, simply ask for them.

5 I think I made that clear.

6 We will send out for lunch for you so you don't  
7 have to go out in this weather.

8 (Two marshals were sworn.)

9 THE COURT: All right. I believe Mr. Green  
10 is in the jury room. Will you ask him to come in before  
11 the jury goes in there?

12 (Alternate juror was discharged.)

13 THE COURT: All right, ladies and gentlemen,  
14 you may go with the marshals.

15 (At 10:56 a.m., the jury retired to commence  
16 its deliberations.)

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2 THE COURT: Gentlemen, I am going to chambers.  
3 If the jury asks for any exhibit, you agree among yourselves  
4 what they are and send them in to them. They may ask for  
5 them all at one time.

6 Secondly, if they ask for any reading of the  
7 testimony, I ask you to agree on it in advance to the extent  
8 possible. And if you believe that it is not necessary for  
9 me to come down merely to sit here while they read  
10 testimony, I would prefer it. If there is some reason for  
11 me to come, I will. Of course, if there are any questions  
12 for the Court, I will obviously come down.

13 (Recess.)

14 (At 11:25 a.m., a note was received from the  
15 jury.)

16 (At 11:53 a.m., the jury returned to the court-  
17 room.)

18 THE CLERK: We have a note here which is marked  
19 Court's Exhibit 1.

cxx 20 (Court's Exhibit No. 1 marked.)

21 THE CLERK: You asked for a copy of the charge.  
22 The Judge cannot give you his charge. But he said if you  
23 have any particular questions referring to the charge,  
24 would you write him a note and ask the question.

25 You also asked to have testimony read. That will

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2 be read now.

3 (Record read.)

4 THE CLERK: I am handing you the exhibits you asked  
5 for (handing).

6 You can retire to the jury room.

7 (At 12:135 p.m., the jury again retired to  
8 continue their deliberations.)

9 (Recess.)

10 (At 2:07 p.m., the jury returned to the  
11 courtroom.)

12 (Jury roll called - all present.)

13 THE CLERK: Mr. Foreman, have you reached a  
14 verdict?

15 THE FOREMAN: Yes, we have.

16 THE CLERK: How do you find? For the plaintiff  
17 or for the defendant?

18 THE FOREMAN: After deliberating and evaluating  
19 the evidence, we have taken into consideration the charge  
20 and we render a verdict unanimously in favor of the  
21 plaintiff.

22 THE CLERK: So say you all.

23 THE COURT: Mr. Hill, do you wish to have the  
24 jury polled?

25 MR. HILL: If you please, your Honor, yes.

2 THE COURT: All right.

3 (Each juror upon being asked "Is that your verdict?"  
4 responded in the affirmative.)

5 THE COURT: Ladies and gentlemen, I thank you  
6 very much for the attention that you gave to us during  
7 your duties in this case. The basic outlines were perhaps  
8 simple but the details were complicated in a way, and I  
9 noticed throughout the trial that you really were paying  
10 close attention and giving it the consideration that any  
11 serious dispute between parties deserves.

12 (Jury discharged.)

13 THE COURT: Gentlemen, we will have to make  
14 arrangements, but we can do that in the robing room,  
15 for the trial of the issue of damages, and I wonder if there  
16 is anything anybody wishes to do at this time for the record.  
17 I believe you have time to make any motions you wish  
18 thereafter.

19 MR. HILL: To preserve the record, your Honor,  
20 I make a motion for judgment notwithstanding the verdict.

21 THE COURT: That motion is denied.

22 If you will come into the robing room, I will  
23 call chambers and we will see when we can get together  
24 for the rest of it.

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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 MARVIN STERN,

6 Plaintiff,

7 -versus-

72 Civ. 143

8 SATRA CORP. and  
9 SATRA CONSULTANT,

10 Defendants.

11 -----X

12 New York, N.Y.  
13 April 17, 1974  
14 10:00 a.m.

15 Before:

16 Hon. Morris Lasker,

17 District Judge.

18 APPEARANCES:

19 STROOCK & STROOCK & LAVAN, Esqs.  
20 Attorneys for Plaintiff  
21 By: ALVIN K. HELLERSTEIN, Esq.  
22 GERALD D. FISHER, Esq., of Counsel

23 SPEAR & HILL, Esqs.  
24 Attorneys for Defendants  
25 By: THOMAS W. HILL, Esq.  
HENRY W. SIMON, Esq., of Counsel

26 ALSO PRESENT:

27 ROBERT PATERSON, Esq.

2 (Case called.)

3 MR. HELLERSTEIN: The plaintiff is ready.

4 MR. HILL: The defendant is ready.

5 THE COURT: Mr. Hellerstein, we are now trying,  
6 on a non-jury basis, the question of damages, and to the  
7 extent it applies, if it does apply, the question of  
8 mitigation of damages.

9 Does the plaintiff have any testimony they wish  
10 to put before me at this time?

11 MR. HELLERSTEIN: No, your Honor, it does not.  
12 The plaintiff has put in the December 1973 agreement which  
13 defines the revenues that Satra has received and expects  
14 to receive under the contract from IBM. The contract  
15 replaces the previous one of September 1971 and the rest is  
16 a logical and a legal extension, which we have discussed  
17 in the memorandum which we submitted to your Honor this  
18 morning.

19 THE COURT: Very good. Thank you.

20 MR. HILL: Before we put on our first witness,  
21 your Honor, I had a very brief opportunity to look at the  
22 memorandum submitted by Mr. Hellerstein this morning.

23 I would like to renew a point that I made during  
24 the course of the trial, but I think we must do it before we  
25 go forward with whatever evidence is to be taken.

2 That is simply this: That the only basis for  
3 calculating any damages based on payments received under the  
4 1973 contract rests, it seems to us, on the legal conclusion  
5 that the 1973 contract is a "renewal" of the 1971 contract.

6 First let me say this: the two contracts are  
7 not in any way similar. They are based on two entirely  
8 different premises by their terms. This is the IBM-Satra  
9 agreement.

10 The 1971 agreement provides for compensation to  
11 Satra basically by means of a commission on sales made in  
12 the Soviet Union and there is also this payment or provision  
13 for two payments of \$25,000 a piece which were not to carry  
14 forward during the life of the contract and the contract  
15 expressly says that after a period there will be a re-  
16 examination as to whether or not there are to be any further  
17 payments.

18 The facts are, as your Honor knows --

19 THE COURT: Any further --

20 MR. HILL: Lump sum fixed payments. As your  
21 Honor knows from the record, no such payments were made while  
22 the 1971 contract was extant.

23 The \$50,000 was paid and that was the end of  
24 that. While the 1971 contracts provided for Satra to perform  
25 what has been variously described here as administrative

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2 services, such as vizas, hotel rooms, etc., there was no  
3 provision in the 1971 contract for Satra to be compensated  
4 for those services as such.

5 In other words, they weren't paid a fee as they  
6 later were in the 1973 contract providing the services.

7 The 1973 contract is an entirely different  
8 ballgame. There is no provision in the 1973 contract for  
9 the payment of commissions on sales by IBM subsequent to the  
10 effective date of that contract. There is a recognition in  
11 the contract that Satra might be owed moneys, and I  
12 emphasize the "might be" part, under or on account of sales  
13 that were made prior to that contract being entered into.

14 Indeed that was provided for in the 1971 contract  
15 itself. In other words, if sales were made during the life  
16 of the contract but the payments were received thereafter,  
17 why Satra would get paid whenever those payments were  
18 received.

19 THE COURT: It's pretty normal.

20 MR. HILL: Yes, pretty normal.

21 So that that provision in the 1973 contract  
22 really, in a sense, adds nothing nor indeed does it take  
23 away from anybody's legal obligations.

24 What is important, however, and I think it's the  
25 key issue here with respect to the 1973 contract, both in

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2 terms of whether or not there was, in fact, a renewal as a  
3 matter of law and also on the calculation of the damages  
4 itself, is this: that the structure of the contract, the  
5 1973 contract, changes. It changes in that it provides,  
6 and very expressly provides in paragraph two --

7 THE COURT: Is the copy of the contract part one  
8 of the memorandum?

9 MR. HELLERSTEIN: It's Exhibit L, your Honor.

10 MR. HILL: I don't have an extra copy, your  
11 Honor. Mr. Appel has taken to his bed with a flu and when  
12 one is suddenly deserted by one's lawyer --

13 THE COURT: That is all right.

14 MR. HELLERSTEIN: This is the exhibit as marked.  
15 This is the new contract, Exhibit L. This is the Stern-Satra  
16 contract, D. Exhibit I is the 1971 basic contract. Here is  
17 the prior group.

18 THE COURT: All right. I do have most of them.

19 MR. HELLERSTEIN: Do you want C or D?

20 MR. HILL: I don't think you need C for these  
21 purposes.

22 THE COURT: What is it you want to point out?

23 MR. HILL: What I would like to point out to the  
24 Court in this regard is -- and I will come back to paragraph  
25 one of this agreement in a minute.

2 THE COURT: You are talking about the 1973  
3 agreement?

4 MR. HILL: Yes, your Honor. If your Honor will  
5 look at page two, paragraph two where reference is made to  
6 this, and it's very specific, it says, "You act as a  
7 financial consultant," and it goes on to say, "for this and  
8 other services more fully described in paragraphs four and  
9 five we are going to get this monthly sum."

10 I would like to say parenthetically that the  
11 word "retainer" does not appear here. When one looks at  
12 paragraphs four and five you will see that they describe  
13 basically these administrative services.

14 This is what this is all about, provide the  
15 arrangements required by.

16 In other words, we have the payment of a monthly  
17 sum and that is the way it's described. That is for certain  
18 specified services.

19 Then it goes on, of course, to provide for the  
20 payment of any commissions that have been earned in the past  
21 and then it provides later on for the payment of an undefined  
22 payment in connection with other services that might be  
23 performed, a fee to be agreed upon in the future.

24 Now, that brings us all the way back, it seems  
25 to me, to the legal question. There is no doubt, I don't

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2 think, and there is really no dispute that these contracts  
3 are complete, that there is nothing ambiguous about them.  
4 They should be governed by their terms and indeed what they  
5 say. I don't think there is any necessity here, and would  
6 submit there is no necessity, for parol evidence as to what  
7 the parties meant or they didn't mean.

8 So the rule of law, as we understand it, your  
9 Honor, and I must say it's difficult to find authority on  
10 it because everybody seems to assume this to be the case,  
11 certainly the cases themselves that we have been able to  
12 find in the time available to us.

13 On this question of what is a renewal and what  
14 isn't a renewal, it arises in the case of leases and in that  
15 kind of contractual circumstance, the rule is, at least as  
16 we understand it, that there is no renewal unless the second  
17 contract is and contains the same terms, the same provisions  
18 as the contract which preceded it.

19 In other words, if you have a second contract  
20 and the terms are markedly different with entirely different  
21 consequences brought about by changing circumstances there  
22 simply cannot be, as a matter of law, renewal.

23 THE COURT: I haven't studied your case yet, but  
24 I can see the difference between the question of what con-  
25 stitutes a renewal, if that is the right word to use in the

2 circumstances in a two-party situation in which, for example,  
3 IBM and Satra alone were concerned and the question arose  
4 as to whether a lease between them had been renewed or had  
5 not, or something of that sort, and a three-party situation  
6 where the third party did not have an opportunity to parti-  
7 cipate in the negotiation of the new agreement because it  
8 would seem to me too facile a way -- and I am not suggesting  
9 Satra was trying to do this -- but the result of too narrow  
10 a view of this situation would be to create a too facile  
11 method by which two parties could exclude a third party by  
12 altering a few terms in the agreement.

13 MR. HILL: I don't have any problem with that,  
14 your Honor. I don't think. I think that raises a different  
15 issue in terms of whether or not it's a renewal or not.

16 In other words, I think you only get to the  
17 question that your Honor raises upon an allegation, if you  
18 like, on the part of the plaintiff who was not a party to  
19 the negotiations between the defendant and the third party.

20 If there is a charge, which I don't think there  
21 is in this case, and I will be corrected I am sure, very  
22 quickly, if there is such a charge, that the 1973 contract  
23 was initiated by Satra for the purpose of defeating  
24 Dr. Stern's claim -- well, putting it another way, I think  
25 that the rule with respect to renewal applies as long as the

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2 second contract is entered into -- how should I put it --  
3 at arm's length in good faith resulting from a change in  
4 business circumstances, if you like.

5 THE COURT: I come to this question with the  
6 advantages of knowing nothing of what the law is on the  
7 subject at the moment. You tell me there isn't very much  
8 and I am not surprised because it is a special question.  
9 I do have certain reactions which I will articulate and then,  
10 if you wish to say more, of course, you may and I would  
11 like to hear from Mr. Hellerstein.

12 The first is it seems to me in a situation of  
13 this kind, as distinct from the one I referred to as the  
14 two party situation, that a key factor would be not only  
15 what the terms of the agreement were, that is in regard to  
16 payment and matters of that sort, but whether the second  
17 contract on the whole, if not exclusively, dealt with the  
18 same general subject matter as the first. Certainly that  
19 would seem to me to be a telling criteria.

20 The second point that I make and comment on  
21 what you said, that the issue of a third party's rights  
22 doesn't arise unless one or both of the other two parties  
23 proceed in bad faith might be correct, but I am not sure  
24 it's obviously correct.

25 It would seem to me even if they proceeded in

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2 good faith but that they created a renewed contract, that  
3 third party beneficiary is entitled to his benefits. These  
4 are just immediate reactions to the question. I am sorry  
5 I have not had a chance to study the law because I have  
6 been trying a case every minute since I last saw you.

7 But the impression that I have, Mr. Hill, is  
8 that -- well, it's not an impression. I don't think I am in  
9 a position to decide in advance, as a matter of law, before  
10 we hear any testimony whether or not this contract constitutes  
11 a renewal. I think that you ought to proceed on the  
12 assumption that I might rule that it is a renewal and put  
13 any evidence that you want before me and you are also  
14 entitled, as far as I am concerned, to put any evidence  
15 before me with regard to the question of its renewal although  
16 you stated that you thought that the matter should be  
17 decided on the faces of the contracts.

18 MR. HILL: I understand that and I assume that  
19 your Honor would do no less in the circumstances, but I  
20 think for the record we must protect our position.

21 THE COURT: I am glad you know what the position  
22 is and it will alert me to the things I should look for.

23 MR. HILL: It would have a bearing on what we  
consider to be relevant evidence with respect to these IBM  
contracts. In other words, it is our view that it is

2 certainly relevant, even our own statement of -- how should  
3 I put it -- the motivations, the circumstances which led  
4 to the execution of the 1973 contract.

5 However, and I think this is in our view crucial  
6 it is our view that these contracts do express the relation-  
7 ship between the parties, ~~whatever~~ that relationship may be.

8 THE COURT: I think it's certainly a *prima facie*  
9 presumption.

10 MR. HILL: We will, I think, be vigorous, to say  
11 the least, with respect to what we think is the proper  
12 application of the parol evidence rule here. It seems to  
13 us it would be highly improper to examine, for example, a  
14 representative of IBM on what he thought a particular term  
15 meant in the sense that that would not be binding on us  
16 certainly.

17 THE COURT: I think that is a good point to make  
18 and lawyers, even judges, are not very happy about going  
19 behind contracts, but we have a special situation now that  
20 we have to feel our way now and at least on the question of  
21 what Mr. Hellerstein claims there was bad faith he would  
22 certainly be entitled to depend on that.

23 MR. HILL: Of course. I ask your Honor to read,  
24 because I think it puts a lot of the testimony you will hear  
25 into some context, paragraph one of the 1973 agreement which

2 provides expressly that the 1973 agreement is terminated and  
3 there is a relinquishment of all claims except with respect  
4 to these commissions which were earned at an earlier point  
5 in time.

6 THE COURT: I note that.

7 MR. HILL: With that, your Honor, I have nothing  
8 to add and we are prepared to go forward.

9 THE COURT: Do you want to comment on these  
10 points at all, Mr. Hellerstein, before we call any witnesses?

11 MR. HELLERSTEIN: Yes, your Honor. I think in  
12 understanding this situation we have to go back to the  
13 original contract between Dr. Stern and Satra, which is  
14 Exhibit D and to note, in connection with this, that this  
15 contract was made before any deal was made with IBM.

16 THE COURT: The August 31 or September 1st?

17 MR. HELLERSTEIN: Yes. It shows the parties had  
18 not even gone to the point of discussing terms with IBM.  
19 This looked forward to the possibility of an agreement and  
20 Dr. Stern and Satra were to form a proposed joint venture  
21 with respect to the possibility of that deal and the deal  
22 it eventuated.

23 Dr. Stern's compensation was to be 50 percent  
24 of gross revenues received from IBM -- I will leave out  
25 Stromberg Carlson.

2 It was to be payable for all amounts accrued  
3 by Satra, all amounts, and it said during the term of any  
4 agreement signed by Satra with IBM, that is one duration,  
5 and a second duration --

6 THE COURT: Where is that?

7 MR. HELLERSTEIN: The body of paragraph B, as  
8 in boy, of proposal number one. It's the third page of the  
9 Satra letter.

10 These commissions will be payable for all  
11 amounts accrued by Satra. The word "these commissions"  
12 refers to Dr. Stern's compensation. These commissions will  
13 be payable for all amounts accrued by Satra.

14 During the term of any agreement signed by  
15 Satra with IBM -- and that is the first duration.

16 The second duration point is "plus all  
17 commissions that may be earned from sales then under negoti-  
18 ation."

19 In other words, when the first IBM-Satra deal  
20 ends, there may still be commissions coming in on sales  
21 negotiated during that period but consummated afterwards.  
22 That is a second duration interval.

23 The third duration interval reads as follows:  
24 "Commissions, that is compensation to Dr. Stern, will also  
25 be paid during the term of any renewal of such agreement

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2 provided Stern continues to provide such time necessary to  
3 service this agreement."

4                   What these parties were contemplating at the  
5 time, that is, Dr. Stern and Satra, was a long-term  
6 relationship to abide not only an initial contract with IBM,  
7 the term and duration of which was completely unknown, but  
8 an extended period beyond that. That is what we read out  
9 of this agreement.

10                  Now, we also know that the parties, among them-  
11 selves and in contemplation of a possible deal with IBM,  
12 were discussing numbers of possibilities. Mr. Gifford  
13 testified about retainers of \$100,000 to \$500,000 a year.  
14 Mr. Oztemel talked about sizable retainers. Satra was  
15 supposed to do numbers of different kinds of things for IBM  
16 and they were looking to get compensated, as best they could,  
17 subject to negotiations of retainer payments, by commissions  
18 either one or both. Everything was unknown at that point.

19                  The only thing that was known was that Dr. Stern  
20 and Satra would be in it together, so they thought.

21                  That is the reading of Exhibit D. Then we come  
22 to the first IBM contract which is Exhibit I. There are a  
23 number of things that are interesting here. On page two  
24 and page three there are two interesting paragraphs, among  
25 many, that describe what Satra was to do for IBM.

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2 Paragraph C says the consultant shall provide such office  
3 space and administrative services as the company may, from  
4 time to time reasonably require. Other of the paragraphs  
5 describe other types of administrative services that Satra  
6 was to provide.

7 Paragraph H on page three makes reference to the  
8 barter and financing transactions that were to be called  
9 upon on Satra, that IBM was to require. The agreement  
10 contemplated that Russia might pay other than western  
11 freely convertible currency and Satra was given the obligation  
12 to convert those funds.

13 THE COURT: Would you point to those subjects  
14 that appear again in the 1973 agreement?

15 MR. HELLERSTEIN: Yes, your Honor. I will get  
16 to that.

17 Paragraph four talks about how much Satra was  
18 to get for this. As consideration they were to receive  
19 commissions equal to three and a half percent of the  
20 revenues and under paragraph B they were also to get a  
21 retainer, which was an advance and described as such chargeable  
22 against future commissions.

23 THE COURT: I think you said paragraph four for  
24 the record. Paragraph Roman two page four.

25 MR. HELLERSTEIN: Yes, article two, Roman two,

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2 paragraph B, page four, Exhibit I.

3 Now we come to the December 1973 agreement and  
4 we notice a few things here.5 First of all, this agreement begins before the  
6 1971 agreement ended. The 1971 agreement had a five-year  
7 term.

8 THE COURT: Before it ended by its own terms.

9 MR. HELLERSTEIN: Or before it could be  
10 cancelled. The 1971 agreement was to last for five years,  
11 that is until September 21, 1976. It was terminable by  
12 IBM at the end of three years, if the annual sales volume  
13 of IBM did not exceed \$50,000,000. That means that IBM did  
14 not have the right to terminate it until September 21, 1974,  
15 several months hence.16 The parties effective September 21, 1973, that  
17 is the year before the right to terminate, on an agreement  
18 made in September 1973, terminated. They, in effect,  
19 replaced that agreement with a new agreement.20 When we look at this new agreement, which is  
21 Exhibit L, we find some interesting things in it. There is  
22 no specific definition in terms of specifics of what Satra  
23 is to do but by general reference we find that Satra is  
24 required to do what they were always required to do, namely,  
25 provide administrative services and provide financial

2 services.

3                   But this agreement, like the old agreement,  
4 contemplated that Russia might pay in currency other than  
5 freely convertible western currency. Those terms are found  
6 in this agreement.

7                   THE COURT: Paragraph five, I believe.

8                   MR. HELLERSTEIN: That is where it is, your  
9 Honor. Paragraph five, yes.

10                  IBM was to pay Satra consideration for these  
11 services. This consideration instead of being a commission  
12 was broken down into two or three components. The first  
13 components were monthly sums. These were monthly sums in  
14 consideration for services to be rendered.

15                  It is precisely the thing we are talking about.  
16 We talk about retainers and the dictionary defines it as  
17 such.

18                  The second method of compensation was denominated  
19 a transaction fee. That is as and when Russia decided to  
20 pay in other than freely convertible western currencies,  
21 Satra would have the obligation either itself to make the  
22 conversion that was necessary, either by financing arrange-  
23 ments or by barter, or switch or whatever, or to find some-  
24 one else to do it and IBM was to pay a transaction fee to  
25 Satra that was commercially reasonable, understandings that

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2 I suppose exist.

3                   A third method of compensation was Satra would  
4 be able to get revenues by dealing in these blocked funds  
5 or Russian currency or timbre or whatever else Russia wanted  
6 to pay.

7                   We come, I think, to this fair inference, that  
8 the only thing that changed in the December 1973 agreement  
9 was the compensation by IBM to Satra, the method of compen-  
10 sation.

11                  IBM instead of having to pay what averages out  
12 to four percent of its sales to Russia, which could have  
13 been astronomical, made a deal with Satra that it would pay  
14 precise fixed amounts over a period of time. In effect, it  
15 was in accord and satisfaction. The parties terminated an  
16 agreement that was to run by its terms until September, 1976  
17 and could not be terminated except for cause until  
18 September 1974 and replaced it with a different agreement  
19 that had a term that was to run indefinitely, according to its  
20 words, except that either party could terminate beginning  
21 February 1, 1977 and year to year thereafter.

22                  So what we have is an agreement that replaces  
23 an older agreement before the older agreement was to lapse  
24 or terminate.

25                  Secondly, we have precisely the same relationship

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2 with precisely the same parties making a more comfortable  
3 financial arrangement as between them. How this could be  
4 applied or interpreted in such a fashion as to evade obli-  
5 gations that the jury found were properly due and owing  
6 from Satra to Dr. Stern is a mystery. It really is an  
7 artifact in any term that is properly used in a courtroom  
8 or in the English language, because what we have is one  
9 agreement standing in place of the other agreement extending  
10 by just a very few months the term of the original agreement,  
11 providing for generally the same thing with the same  
12 relationship, having the same objectives, having the same  
13 purposes, calling upon the parties to do roughly the same  
14 kinds of things they were to do before.

15 It is to be argued that this is something brand  
16 new and different free, in some mysterious fashion, of the  
17 obligations duly owing from Satra to Dr. Stern.

18 I don't think we have any specific obligation to  
19 allege and prove bad motive or bad faith. I think those  
20 terms are immaterial. What we are looking for is contract  
21 compensation.

22 Dr. Stern entered into a joint venture with  
23 Satra, a valid and enforceable joint venture. He was ready  
24 to perform and do what he had to do. Dr. Stern defined  
25 everything he intended to do, that is to be the communication

2 hub, as it were, defining what was technologically useful for  
3 IBM to Satra and defining to IBM what Satra could do for  
4 IBM and he was denied the ability and the right to continue  
5 with that and Satra went on its way.

6 We are not arguing here if Dr. Stern was there,  
7 more profits would have accrued. That is certainly a pos-  
8 sibility but we are certainly arguing that Dr. Stern cannot  
9 suffer the indignity and illegality of having denied to him  
10 the compensation that is justly due to him under his agree-  
11 ment. That is the position I take.

12 THE COURT: Thank you, Mr. Hellerstein.

13 MR. HILL: Your Honor, I am going to ask  
14 Mr. Simon to examine Mr. Curtin, who will take the stand.

15 THE COURT: All right.

16 MR. SIMON: This witness has not been sworn,  
17 your Honor.

18 THE COURT: All right, we can remedy that in  
19 short order.

20 (Continued on page 21.)

21

22

23

24

25

2 M I C H A E L E. C U R T I N, called as a witness  
3 on behalf of the defendant, having first been duly  
4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SIMON:

7 Q Would you state your name, please.

8 A Michael E. Curtin.

9 Q Mr. Curtin, how are you employed?

10 A Treasurer of Satra Corporation.

11 Q How long have you been associated with Satra  
12 Corporation?

13 A Since early February of last year.

14 Q Very generally would you tell the Court your  
15 educational and business background.

16 A In 1961 I received a BBA in Finance from the  
17 University of Notre Dame. Subsequent to that I spent two  
18 years in the Peace Corps and then I returned, received an  
19 MBA in Accounting from the University of Chicago Graduate  
20 School of Business.

21 In June of 1965 I then went to work for  
22 W. R. Grace & Company in New York as a trainee, was sent to  
23 Chile in South America in March of 1966 where I became  
24 Administrative Assistant to a multi-production facility that  
25 Grace had in that country.

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2 I returned in 1968 and went to work in the  
3 Corporate Finance Department of W. R. Grace as a financial  
4 analyst. I then became Director of Planning of Special  
5 Projects for the Industrials Chemicals Groups of W. R. Grace  
6 which position I held until June of 1970.

7 In 1970 I joined two other friends of mine in a  
8 venture which was called Marine International Corporation  
9 which I subsequently left in November of 1972, I guess it  
10 was.

11 THE COURT: You went south in February of 1973.

12 THE WITNESS: Right.

13 Q You are now the chief financial officer of  
14 Satra?

15 A Yes.

16 Q Under your responsibilities you have kept its  
17 financial records and documents and other evidences of its  
18 transactions?

19 A Right.

20 Q Have you had occasion to become familiar with  
21 the controversy between Marvin Stern and Satra Corporation?

22 A Yes, on an accounting basis, a peripheral basis,  
23 not a legal basis.

24 Q Would it be fair to state that you had no part  
25 whatsoever in any of the acts, conferences, meetings or

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23

2 agreements that led up to this controversy?

3 A Can I ask a question?

4 THE COURT: Yes.

5 THE WITNESS: You mean the original contractual  
6 relationships?

7 Q Right.

8 A No, I didn't have anything to do with it.

9 Q Have you, at my request, had occasion to look  
10 over a statement of the income which has been received from  
11 IBM to Satra Corporation for the operation of the Stern  
12 contract from September '71 through March of 1974?

13 A Yes.

14 MR. SIMON: I am going to ask the reporter to  
15 identify this schedule which has not been previously  
16 identified.17 (Defendant's Exhibit 1 was marked for identifi-  
18 cation.)19 Q Mr. Curtin, have you had an opportunity to look  
20 over what has now been marked for identification as  
21 Defendant's Exhibit No. 1?

22 A Yes, sir.

23 Q What is the exhibit -- and would you address  
24 yourself to each of the three pages of it in your description.

25 A Well, the first page entitled "First year," is a

1 jag Curtin-direct 24

2 basic summary accounting c. the sums of money received by  
3 Satra from IBM in the first column. I believe we may have  
4 the dates transposed. I think there is a typo, 25,000,  
5 two lump payments totalling \$50,000.

6                   Then in the fifth column you have reimbursement  
7                   of out of pocket expenses which totals \$2,405.38.

12                   A        Reimbursement of out of pocket expenses repre-  
13                   sents those sums of money received by Satra and New York in  
14                   reimbursement for our payments to an organization known as  
15                   American Travel Abroad which represents tickets and vouchers  
16                   purchased by Satra for IBM personnel travelling to the  
17                   Soviet Union.

18 Q Mr. Curtin, let me ask you a general question.

24 MR. HELLERSTEIN: If your Honor please, I have  
25 no problem about any recap or recapitulation of revenues

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2 received. In fact, we have those in evidence in Exhibit  
3 DDDD.

4 The mathematical extensions are nothing more  
5 than a disguise of various legal contentions which have no  
6 right to be in a recapitulation and, on the best evidence  
7 rules, on the grounds of irrelevance, I would object to  
8 anything more than a recapitulation of revenues.

9 THE COURT: Something like this would be handy  
10 if it fairly reflects the facts. I think what I would like  
11 to proceed to is to get the answer to the question and  
12 allow you a voir dire if you want. If I am not satisfied  
13 with the answer, I will allow your objection.

14 A I believe it represents the recapitulation of  
15 revenues as you have stated, some mathematical extensions  
16 thereto.

17 MR. SIMON: For the purpose of anticipating some  
18 of Mr. Hellerstein's questions and perhaps shortening the  
19 voir dire, it might be helpful if I ask --

20 THE COURT: You can ask him how he made it.

21 Q In fact, Mr. Curtin, let's look at the columns  
22 which are past the column marked "reimbursement out of  
23 pocket expenses" and I will ask you if it's not a fact in  
24 the column marked "expenses per schedule" that particular  
25 figure was placed there by me simply for the purpose of

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reflecting the fact that the schedule on the contract with Dr. Stern anticipates a \$100,000 agreed figure of expenses per year?

5

A That is correct.

6

Q That is not your figure, that is my figure?

7

A That is your figure.

8

Q Likewise the 40 percent expense application was placed on the exhibit by me simply by taking the percentage of 40 percent and applying it against revenues as is suggested by one of the exhibits which I term the Hauser draft for purpose of convenience.

13

A That is true.

14

Q And the figure paid to Stern is, in fact, your figure reflecting the amounts of money which were paid to Dr. Stern by Satra Corporation?

17

THE COURT: That is not disputed anyway.

18

MR. SIMON: With the obvious qualifications and, of course, taking in mind the fact that we are trying this before the Court, and, indeed, a knowledgeable Court, we offer the exhibit for whatever it may be worth broken down as between actual figures and certainly some mathematical extensions.

24

THE COURT: All right.

25

(Continued on page 27.)

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VOIR DIRE EXAMINATION

3

BY MR. HELLERSTEIN:

4

Q Mr. Curtin, when the retainer payments for \$25,000 were paid by IBM to Satra were you part of Satra?

6

A No.

7

Q When IBM paid those, do you know that they paid those as an advance against commissions?

9

A At the time in 1971?

10

Q Yes.

11

A No.

12

Q Do you know they did not? Would you know one way or the other?

14

A The only thing I know about those payments is that subsequently IBM sent an accounting in November of 1973, I believe, at which point they recapitulated or they summarized sales, billings, receipts, commission amounts, and what had been paid to Satra under those, and on that letter I believe the two sums of \$25,000 apiece are identified by them in that letter as being advance commissions. That is the only thing I know.

22

Q Why did you not put them down then under the box of advance commissions? Was that because you received any instructions from counsel in how to categorize this chart?

25

A No. As I believe counsel said, he prepared this

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2 chart. He asked me for verification of the revenue figures.  
3 He was the one who classified them as original retainer.  
4 I had brought it first to his attention that in the letter  
5 from IBM of November whatever, they are identified by them  
6 as being advance commissions and for his own reasons he  
7 chose to put them where he put them.

8 MR. HELLERSTEIN: If your Honor please, I object  
9 to the document in evidence. It does nothing more than  
10 repeat what is already in evidence as Exhibit DDDD except to  
11 advance a number of contentions that Mr. Simon prepared.  
12 It might as well have been he to be the witness and not the  
13 interrogator.

14 THE COURT: I believe I will have to sustain the  
15 objection except perhaps during some recess Mr. Simon and  
16 Mr. Hellerstein can agree that the deletion of character-  
17 izations, for example, may be made. I know from the  
18 preface or trial, of course, that \$50,000 was received and  
19 I know that 12,500 was paid out to Dr. Stern.

20 I know there was a reference to \$100,000 in one  
21 place and a reference to 40 percent in another, which if  
22 applied \$50,000 would produce \$20,000, so if this is to be  
23 presented to me as a part of a memorandum of law or something  
24 of that kind, I would accept it, Mr. Simon.

25 But as evidence that these \$50,000 were

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2 received as original retainers, I don't think I can receive  
3 it.

4 MR. SIMON: I don't mean to argue it. It's  
5 meaningless. We are all aware of the facts and the witness  
6 testified that he has no personal knowledge of these things  
7 and that I prepared it. But we do need something to work  
8 with rather than be thumbing through different exhibits.

9 THE COURT: For the purpose of referring to  
10 figures without my accepting any characterization of their  
11 significance I will be willing to be guided by this.

12 MR. SIMON: If the Court please, I would be  
13 willing to stipulate with Mr. Hellerstein that the words at  
14 the top were included by me and have no significance, are  
15 not to be construed as evidence of that, indeed the entire  
16 exhibit is merely a numerical breakdown to be used in our  
17 discussions.

18 MR. HELLERSTEIN: Then this document is nothing  
19 more than a repeat of Exhibit DDDD which was stipulated to  
20 by Spear & Hill, by our firm, and by Paterson, Belknap &  
21 Webb.

22 THE COURT: To what extent would it differ from  
23 Exhibit DDD?

24 MR. SIMON: It's easier to read.

25 THE COURT: For the purpose of this discussion

1        jqd  
2        I will go along so that Mr. Simon can the questions in the  
3        manner he wishes to. I will look at the paper he wants to.

4                But the evidentiary material, if anybody wishes  
5        to comment on the evidence, will be found in Exhibit DDD  
6        and that will be regarded as the evidence of the figures.

7                MR. SIMON: That is entirely okay with me.

8        DIRECT EXAMINATION

9        BY MR. SIMON (Continued):

10        Q        If you will look at the schedule, I ask you to  
11        direct your attention to the column that is marked  
12        "reimbursement of out of pocket expenses."

13                Do you see that column?

14        A        Yes, sir.

15        Q        Have you again, at my request, prepared  
16        internally in the Satra office a breakdown of the reimburse-  
17        ments which have been received by Satra and what they are  
18        for?

19        A        Yes, I have.

20        Q        I hand you what I will mark, if it's all right  
21        with the Court and the reporter, Defendant's Exhibit No. 2  
22        for identification.

23                (Defendant's Exhibit 2 was marked for  
24        identification.)

25        Q        Mr. Curtin, do you have before what has now been

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2 marked as Defendant's Exhibit No. 2 which I will describe  
3 as comprising three pages of which the first page says in  
4 the upper right hand corner, "Schedule B Summary"?

5 A Yes.

6 Q What is the import of the figures which are  
7 prepared on the three pages thereby displayed?

8 MR. HELLERSTEIN: I object on the grounds of  
9 irrelevance and possibly other grounds that may come to me  
10 as we go along.

11 We are making no claim with regard to reimbursed  
12 moneys. Dr. Stern has no right for any money that Satra  
13 receives by way of reimbursement from IBM arising from out  
14 of pocket expenses made by Satra.

15 THE COURT: You are willing to accept this  
16 figure as the figure?

17 MR. HELLERSTEIN: It's irrelevant. I think it  
18 should not be in the case.

19 THE COURT: If you agree on the amount -- to  
20 prove what the amount is -- it's not just a question of  
21 theory.

22 MR. HELLERSTEIN: They don't prove the amount  
23 because it has nothing to do with the case whatever.

24 The second point here is that they have a  
25 column on page two of incurred and non-reimbursed --

2 THE COURT: Talking of Exhibit 2?

3 MR. HELLERSTEIN: Yes, incurred and unreimbursed  
4 expenses to which I take exception because the only aspect  
5 of expenses that could conceivably be relevant with respect  
6 to commission revenue are expenses that are put on the  
7 schedule, that is the schedule to Exhibit C and Exhibit D,  
8 the Stern-Satra agreement.

9 The parties agreed that actual expenses would  
10 be irrelevant. So why are we bothering ourselves with actual  
11 expenses?

12 THE COURT: What do you have to say in answer to  
13 the argument of the significance of the actual expenses?

14 MR. SIMON: In view of the stipulation by  
15 Mr. Hellerstein, we accepted that. It has been my  
16 impression I would have to admit, although I do not know to  
17 what it traces, that Dr. Stern has taken some position that  
18 expenses to be reimbursed Satra were on a 40 percent basis  
19 across the board and that Satra was not entitled to dollar  
20 for dollar credit on expenses whether they were directly  
21 paid by IBM or recouped per the schedule.

22 Certainly it's my position we are entitled to  
23 100 percent recoupment.

24 Mr. Hellerstein agrees it's dollar for dollar and  
25 so it's stipulated --

2 MR. HELLERSTEIN: Mr. Simon is perverting the  
3 arguments. Our position is that the revenues received by  
4 Satra are subject to sharing with Dr. Stern. If Satra in  
5 addition to its revenues asks IBM for reimbursement of  
6 out of pocket expenses, for example, for advancing air  
7 travel or advancing documentary expenses for visas and the  
8 like and IBM pays these amounts back to Satra, that is not  
9 our concern and not the concern of any lawsuit.

10 THE COURT: And you make no claim for it?

11 MR. HELLERSTEIN: That is right.

12 THE COURT: Is that what you have in mind?

13 MR. SIMON: I am somewhat lost in the morass.

14 THE COURT: That concept doesn't seem to me to  
15 be very morassic. That concept is simply, as I understand  
16 it, if Satra ever shells out any money or expenses for IBM  
17 and gets it back, Dr. Stern makes no claim to any such money.

18 Have I oversimplified?

19 MR. HELLERSTEIN: I don't think you have. In  
20 fact, if we go back to Exhibit DDDD, this document states  
21 precisely and it's a stipulated document, it states the  
22 revenues that have been received by Satra to which we make  
23 claim. It also has two items, three items of reimbursement  
24 of expenses incurred for IBM World Trade Corporation.

25 It's very plain from our papers that we make no

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2 claim with respect to those three items. They total about  
3 \$22,000 and they are not in the case.

4 THE COURT: All right.

5 MR. SIMON: Agreed.

6 Q Mr. Curtin, have you, at my request, prepared  
7 what we will mark for identification as Defendant's Exhibit  
8 3?

9 (Defendant's Exhibit 3 was marked for identifi-  
10 cation.)

11 Q Did you prepare Defendant's Exhibit 3?

12 A Yes, I did.

13 Q What, in fact, is Defendant's Exhibit 3 which,  
14 for the purpose of the record, I will describe as comprising  
15 three pages and being identified as expenses incurred  
16 relating to IBM business?

17 A I was asked to try and summarize from the books  
18 of Satra Corporation the amounts of expenses which the  
19 corporation had incurred either in New York through the  
20 corporation directly, the consultant corporation, or the  
21 industrial corporation, either in New York, Moscow or Vienna  
22 which could be directly related to carry out the contractual  
23 obligations between Satra Corporation and IBM.

24 THE COURT: Gentlemen, I have just gotten a note  
25 from the jury that they have reached a verdict which is good

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2 for all of us. I am sorry to interrupt your testimony but  
3 I will now recess this case and call counsel in the other  
4 case.

5 (Recess.)

6 THE COURT: Mr. Simon and Mr. Hellerstein, I  
7 have no desire to tell you how you should handle your case,  
8 but since this witness is associated with Satra, I was  
9 wondering, in view of Mr. Paterson's statement that  
10 Mr. Witham and some of the others are anxious to leave,  
11 whether we should hear them first or do I have to understand  
12 your witness' testimony before I can go on to the others?

13 MR. SIMON: I think it would be helpful to have  
14 the basic numbers in front of you.

15 THE COURT: All right.

16 MR. SIMON: One of my problems in this case has  
17 been that there has been an awful lot of talk about contracts  
18 and talk from lawyers and very little real dealing with the  
19 numbers because of the fact that we bifurcated the trial.

20 THE COURT: We are up to Defendant's Exhibit 3  
21 which you were about to describe to us or started describing  
22 it.

23 THE WITNESS: I was asked to determine expenses  
24 incurred by Satra related to the IBM contractual obligations,  
25 and I reviewed the accounting records available for the

1 jqd

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2 various corporate entities which had to deal with the  
3 performance of those obligations and then prepared the  
4 schedule and broke down the schedule into the periods  
5 requested.

6 Q Would it be fair to say that to some extent at  
7 least these numbers are arbitrary and you simply had to  
8 guess or designate a fair percentage?

9 A I had to make certain assumptions as to what  
10 type of activities were carried out in different parts of  
11 the corporate offices and then apportion on an assumption  
12 basis which ones of those were related to IBM and which ones  
13 could be, under accounting terms, directly identified with  
14 fulfilling the contractual obligations. In that sense  
15 they are arbitrary.

16 THE COURT: Let me ask a question, if I might.

17 Are you talking about a situation in which, for  
18 example, somebody might have gone to Moscow for more than  
19 one client and you had to decide how much was attributable  
20 to IBM and how much would be attributable to somebody else?  
21 Can you give me an example?

22 THE WITNESS: On page two, you will notice the  
23 Moscow office. I broke down the total expense of the Moscow  
24 office for the total period involved. I then apportioned  
25 certain sums to the IBM contractual obligation based on the

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2 assumption that of the total personnel in that office certain  
3 ones of them can be directly identified with IBM business  
4 and others can be broken out.

5 THE COURT: All right.

6 MR. HELLERSTEIN: If your Honor please, we are  
7 again engaged in an irrelevancy because we are never to  
8 deal with actual expenses. The parties so agreed. The  
9 parties agreed that the only expenses that would be  
10 involved would be schedule expenses and the parties agreed  
11 that way because Satra did not want to give Dr. Stern the  
12 right to audit the books of Satra Corporation and because  
13 perhaps of the very reason that Mr. Curtin should assign,  
14 that any allocation would be arbitrary and an assumption.  
15 I don't know why we are wasting our time on this.

16 THE COURT: What is the relevance of this,  
17 Mr. Simon, in view of what appears to be undisputed schedule  
18 arrangements set forth in Exhibits C and D?

19 MR. SIMON: Your Honor, this, of course, is the  
20 core of what seems to me to be the dispute between thewe  
21 parties and has been all along. The parties have an agree-  
22 ment. The jury found they had an agreement, or at least the  
23 jury found they tried to make an agreement which, I suspect,  
24 is a little closer to the actual facts.

25 From that agreement the parties determined in

1 jqd Curtin-direct 38

2 advance that the expenses which Satra would incur would be  
3 a minimum of \$100,000 a year and they agreed on that fact.4 MR. HELLERSTEIN: That is not the case, your  
5 Honor. In fact, that was the contention that the jury  
6 specifically disavowed. And Mr. Hill argued to the jury --7 THE COURT: Let me hear Mr. Simon's theory  
8 fully and you can answer it.9 MR. SIMON: The parties agreed that \$100,000 of  
10 expenses would be incurred by Satra as what they believed  
11 a reasonable anticipation, admitting that it was arbitrary  
12 and admitting that they did not actually know.13 I am perfectly willing to stipulate with  
14 Mr. Hellerstein that the original anticipation of \$100,000  
15 a year was, in fact, reasonable at the time it was agreed  
16 on and has, in fact, been incurred. If that lies in the  
17 record and if we can agree on that fact, then I see no  
18 reason to proceed with this line. But it does seem to me  
19 that what the Court must now do is to say, "Okay, the  
20 parties have a deal, what kind of deal do they have?" And  
21 in view of that --22 THE COURT: That I obviously will have to  
23 determine. That is not going to be determined for me by  
24 hearing how much of the expense of the Moscow office  
25 Mr. Curtin attributed to IBM as distinct from somebody else.

2 I am not quite prepared at this moment to say that I  
3 entirely agree with Mr. Hellerstein, although I must say  
4 that we are going into specific expenses.

5 At the same time I don't think Mr. Hellerstein  
6 disputes with any degree of seriousness that the general  
7 range or expense that you are talking about -- well, he  
8 says it doesn't have anything to do in the case. I would  
9 regret having to spend any considerable period of time  
10 listening to testimony about what the expenses are if at the  
11 very least, the real argument is whether they are chargeable  
12 or not chargeable and not how much they are.

13 MR. SIMON: I agree with you in this sense. If  
14 I think we all understand, as I think we all do now, that  
15 the expenses are, in fact, being incurred and that it would  
16 not thereby by fair were the Court to look into the equities  
17 to determine that the \$100,000 as anticipated in advance  
18 was a reasonable anticipation, and that the figure was  
19 substantially close to what the expenses really are, I am  
20 well satisfied to leave the line alone.

21 But I think it's up to us, under the circumstances  
22 where we have an agreement but we disagree as to what it  
23 means, to put before your Honor a reasonable interpretation  
24 of how these parties went into the deal, what the real  
25 facts are.

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2 It is, in fact, these expenses in no small  
3 measure which lead directly to the 1973 contract. The  
4 fact that the expenses were being incurred in this amount  
5 and that there were no revenues coming in, that seems to me  
6 to be clearly material.

7 THE COURT: It may be material if the reason  
8 for your entering into the December 1973 agreement are  
9 material at all, then such material or such information  
10 would be part of that.

11 I regret that I am not in a position to take  
12 any more fixed attitude towards the questions that are  
13 being raised today than I am, but my schedule hasn't  
14 permitted me to think about these issues since you were  
15 last before me. I haven't even tried to consider what the  
16 meaning of the jury's verdict is as to the issues that are  
17 being raised at the present time.

18 I don't know what the total of the amounts is  
19 that you are going to be dealing with, but this seems to me  
20 the way we should proceed, particularly in the light of the  
21 fact that there are other witnesses here who are not any  
22 longer anything but either bystanders or whatever it is.

23 That is, that I would hope the parties can agree  
24 as to what amounts of expense were incurred, or  
25 Mr. Hellerstein would say he would not contest evidence to

1 jqd

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2 the fact that certain expenses were incurred, reserving,  
3 as he has, on the record, the position that whatever the  
4 expenses incurred were, is irrelevant.

5 MR. SIMON: I was going to suggest the same  
6 thing and pass this witness.

7 THE COURT: That I think would be good. If you  
8 can't reach that agreement, Mr. Hellerstein, then I think  
9 we should pass it for the moment anyway and you can look  
10 at these figures perhaps during the lunch hour and see if  
11 there is a problem. If you can't agree that you would not  
12 contest the figures if Mr. Curtin were to testify about  
13 them, but that they are irrelevant, then I would still hope  
14 to put the figure aside at the moment except for a range of  
15 some kind and let me come to grips with the legal questions  
16 involved and if I find it ever becomes necessary to hear  
17 what Mr. Curtin's testimony is as to precise figures, I  
18 can always do it.

19 MR. HELLERSTEIN: It's the last point that I  
20 think I would except to, your Honor. If expenses were to  
21 be important then there is a way to prove those expenses  
22 and not by summaries. There is a best evidence objection  
23 that applies so that I would have an opportunity to see the  
24 precise data.

25 But I would be content for our exercise today

1 jqd

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2 if Mr. Simon would just give a number as expenses, and I  
3 don't care if they are real or arbitrary, whatever.

4 THE COURT: He would offer to prove whatever  
5 the amounts are and let that offer to prove stand on the  
6 record to be used in such a way as, I believe, it is  
7 necessary for the time being. All right?

8 MR. HELLERSTEIN: I think that would be a good  
9 way of doing it.

10 MR. SIMON: To reiterate what you say and  
11 Mr. Hellerstein says, it's Mr. Hellerstein's position that  
12 the numbers are not material to the controversy before the  
13 Court but in the event your Honor determines they are  
14 material, they want the right to cross-examine and do  
15 whatever is necessary to prepare themselves for that  
16 examination.

17 It is our intention to prove today, and we make  
18 an offer of proof, that the numbers we will be admitting is  
19 an arbitrary range, as displayed on the first page of  
20 defendant's exhibit which Mr. Curtin has in front of him,  
21 and will amount for the period September 22, 1971 through  
22 September 21, 1972, to \$147,895.93 and in regard to the  
23 other time periods the numbers shown.

24 THE COURT: On the right hand column for the  
25 IBM portion?

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2 MR. SIMON: That is our contention and we make  
3 that offer of proof.

4 THE COURT: That offer stands and it stands  
5 until the Court determines whether it believes that that  
6 proposed evidence, alleged evidence, is material to the  
7 case or is not.

8 MR. SIMON: Yes, sir. That is my understanding.  
9 We will pass Mr. Curtin.

10 THE COURT: Thank you, Mr. Curtin.

11 (Witness excused.)

12 MR. HILL: We call Mr. Witham, your Honor.

13 (Defendant's Exhibits 2 and 3 were received in  
14 evidence.)

15 THE COURT: All right. 3 is received for the  
16 purposes of making clear what document Mr. Simon was  
17 referring to, but it's not received as proof of the contents.

18 B E R T R A M      H.      W I T H A M, called as a witness  
19 by the defendant, having first been duly sworn,  
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. HILL:

23 Q      Mr. Witham, where are you presently employed  
24 and what is your title?

25 A      Presently treasurer of IBM Corporation.

1 jqd

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2 Q How long have you been associated with IBM?

3 A A little better than 13 years.

4 Q During the course of your association with IBM  
5 have you become familiar with the contractual relationships  
6 between IBM World Trade and Satra?

7 A Reasonably familiar, yes.

8 Q You have been directly involved personally in  
9 those relationships to some extent?

10 A Yes.

11 Q You are aware that there was a contract entered  
12 into between Satra and IBM World Trade Corporation in the  
13 year 1971 with respect to certain services being rendered  
14 by IBM, are you not, sir?

15 A Yes.

16 Q Did there come a time when within the IBM  
17 organization consideration was given to changing the nature  
18 of that relationship as established by the 1971 agreement?

19 A Yes.

20 Q Would you tell me what happened, what occasioned  
21 this consideration of the change?22 MR. HELLERSTEIN: Can I note an objection, your  
23 Honor? I think it's all irrelevant.24 THE COURT: I am not sure it is. I will receive  
25 this.

2 MR. HELLERSTEIN: So I don't have to keep on  
3 getting up --

4 THE COURT: Your objection is to the line of  
5 the testimony, yes.

6 A Perhaps it would be best if I started with the  
7 concept of the original contract and how we came into it.  
8 It was in December of 1971 when the corporation decided to  
9 start entering or attempting to enter business relationships  
10 in the Soviet Union. We had been doing business in most  
11 of the eastern European countries for many years and got  
12 quite active there in about 1967. The matter of how we  
13 might enter the business in the Soviet Union was discussed  
14 in-house.

15 We even talked to a man who later became an  
16 advisor to us, the former Ambassador to Russia,  
17 Mr. Llewellyn Thompson. I believe it was through him that  
18 he suggested that we talk about the services of Satra.

19 This led to discussions with various people  
20 from Satra and the idea was that based on our experience in  
21 dealing with the eastern European countries, that much of  
22 the business had been conducted on a barter basis rather  
23 than on a straight cash basis and that one of the things  
24 which we needed was a financing capability of providing,  
25 that is, buying goods in Russia which would create the foreign

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2 exchange which would pay for the sales of our goods into  
3 Russia.

4 As a matter of policy, we did not like to be a  
5 party in handling those goods, but we normally deal with a  
6 third party and let them provide the foreign exchange. We  
7 understood that Satra and specifically Mr. Ara Oztemel had  
8 been working in Russia for a good number of years and  
9 basically the thing which was attractive to us, above all,  
10 was the matter that he bought a great deal of chrome and  
11 this chrome coming from Russia generated foreign exchange  
12 and, therefore, would be one of the offsets which would be  
13 used.

14 So at that time with the idea that we were going  
15 to do this business with barter we entered into this agree-  
16 ment with Satra and this would be an overall agreement.  
17 Generally speaking, if you do individual barter arrangements  
18 there is a commission which I will say ranges around seven,  
19 eight, nine percent, something like that.

20 Since we were going into an exclusive arrangement  
21 with Satra and that they were going to have the exclusive  
22 business with us in Russia we went and negotiated to a lower  
23 figure which was three and a half percent of the overall  
24 business that we were doing in the Soviet Union for all the  
25 data processing.

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2 I think it was later modified for some of the  
3 office products, typewriter business we would do over there,  
4 and there is a different schedule on that. I believe  
5 seven percent.

6 Included in the three and a half percent was the  
7 agreement that Satra, through their expertise, would provide  
8 us with various administrative services. That is, provide  
9 us with office space as needed in Moscow to set up the  
10 matter of visas, transportation, appointments. All of this  
11 was done, as I say, in August and September of 1971 in  
12 anticipation of our displaying a Model 50 computer, the  
13 360 line at the Leningrad Fair in October of 1971.

14 The contract was agreed to and entered into at  
15 that point.

16 Not long after that, somewhere around along  
17 November, some of us within the corporation were a little  
18 bit concerned in that we were getting reports that Satra  
19 was representing itself as being an agent or representing  
20 IBM in Russia, which was not the case at all.

21 We don't particularly like to have people  
22 represent us. They provide a service for us but we  
23 represent ourselves.

24 Q When you say "as an agent," you mean representing  
25 you as a sales agent?

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2 A This type of thing, "we speak for IBM in  
3 Russia," and that was not the case, and it disturbed us.  
4 I was in Moscow with a business international group the  
5 following month, in December of 1971 and other businessmen  
6 that were in that group made comments to me, "Well, I  
7 understand Satra represents you here in Russia," and I  
8 said, "They do not represent us here in Russia. They have  
9 provided certain services to us and we do have a contract  
10 with Satra."

11 When I returned from Russia I asked one of my  
12 people, Mr. Hendricks, who I believe was here in this Court  
13 at one time --

14 THE COURT: He has been referred to.

15 Q His name has been referred to.

16 A I believe he contacted Mr. Oztemel or one of  
17 his people. Mr. Oztemel does travel quite a bit. He  
18 pointed out this problem. This continued on into the spring  
19 of 1972 and this was acknowledged. But we were a little  
20 concerned about it, a little unhappy about it. We made that  
21 known. We sold the first order, a Model 50 that went to the  
22 Chemical Ministry. We did obtain the export license. It  
23 was installed and contrary to what we had anticipated  
24 originally, they paid cash on the barrelhead, that expression,  
25 rather than a barter.

2 As we continued to deal with Russia we found  
3 that no mention was ever made of barter. It was always:  
4 as this is something else we can talk about, bank financing  
5 or something like that, but never barter, which started  
6 giving us second thoughts as to the agreement which we had  
7 in Satra which gave a three and a half percent override  
8 on everything we did there in anticipation that we were  
9 going to be using that as basically commission for barter.  
10 But now there was no barter so we had a second reason why  
11 we weren't that happy with that contract.

12 But it was a binding contract. We could not get  
13 out of it until September 1974 and then only if revenues  
14 would not exceed an annual rate of \$50,000,000 per year.  
15 It appeared to us at that point in time, summer, fall of  
16 1972, that we were never going to reach \$50,000,000 annual  
17 revenue from our business in Russia prior to the time of the  
18 1974 notification date.

19 Q This was an IBM judgment?

20 A Yes, an IBM judgment.

21 THE COURT: You concluded that you would have  
22 been able to cancel in September 1974?

23 THE WITNESS: Yes. We didn't think we would  
24 get to the point of \$50,000,000 annual revenue. In all of  
25 our proposals, and there were proposals being made during

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2 this period of time dealing with the Kama River project,  
3 the big truck factory which involved \$100,000,000 or better,  
4 several in petrochemicals, several in the petroleum  
5 industry and so on, our people then that were in charge of  
6 the Russian operation, specifically a Mr. Degnan, at one  
7 point in time, started raising questions and concern about  
8 the service we were getting from Satra.

9 I guess as a follow-on to that I asked for a  
10 specific listing of the services which Satra was providing to  
11 IBM personnel in Russia to get a sort of feel of what was  
12 going on. This was provided to me and I think it covered  
13 the period January and February of 1973. I was somewhat  
14 amazed by the amount of services that were being provided.

15 This was conference rooms, seminars, translators,  
16 meeting people at airports. It was a tremendous amount of  
17 activity.

18 Q Was this information furnished to you in writing,  
19 sir?

20 A It was furnished to me in writing by Mr. Ralph  
21 Stafford, who at one time was an employee of ours but who  
22 was then an employee of Satra. I asked him specifically for  
23 that information.

24 MR. HILL: May I have this document marked.

25 (Defendant's Exhibit 4 was marked for

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2 identification.)

3 Q Mr. Witham, I show you a document which is on  
4 the letterhead of Satra Industrial Corporation, dated  
5 February 21, 1973 and I will state for the record, your  
6 Honor, this is a document covered by the stipulation between  
7 IBM, ourselves and the plaintiff, and ask you if you can  
8 identify that document.

9 A Yes, this was a document which I was referring  
10 to.

11 THE COURT: The one Mr. Stafford furnished?

12 THE WITNESS: Yes, Mr. Stafford had furnished  
13 this to me.

14 MR. HILL: I would like to offer the document  
15 at this point.

16 THE COURT: Subject to Mr. Hellerstein's continu-  
17 ing objection, that is received.

18 (Defendant's Exhibit 4 was received in evidence.)

19 A This gave me the idea that perhaps Mr. Oztemel  
20 or Satra might not be as happy with our contractual arrange-  
21 ment as perhaps we were because he was expending obviously  
22 considerable sums of money and we were not generating the  
23 business on which he would get commissions.

24 I thought perhaps there might be quid pro quo  
25 if we could come to a meeting of the minds and perhaps we

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2 ought to work out a different kind of an arrangement.

3 At my request Mr. Oztemel had lunch with me.

4 I believe Mr. Hendricks was with us at the time. I believe  
5 there were three of us at the University Club. This would  
6 have been in the spring of 1973, probably early April. And  
7 I suggested to Mr. Oztemel that maybe the contract which we  
8 had was not mutually advantageous, that the situation was  
9 quite a bit different than what we had originally anticipated  
10 and that we should take a look at a new kind of arrangement  
11 which would be fairer to him in the long run and perhaps  
12 fairer to us, the concept being, which I suggested to him  
13 at that time, that on the services which he would provide  
14 in Moscow with the types of things that I referred to  
15 earlier and are listed in that document, that we might do  
16 that on a cost reimbursement basis. That he would document  
17 the cost and we would add a 20 percent override for profit  
18 or something like this.

19 THE COURT: Cost plus?

20 THE WITNESS: Yes, cost plus, so he wouldn't be  
21 anything out of pocket. And that on the barter transactions  
22 if and when they came about, that this should be done on  
23 pretty much of a first refusal basis. He would have the  
24 first crack at it and then we would negotiate a fee after  
25 that.

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2 Mr. Oztemel agreed that from his standpoint  
3 that the contract that we put together and signed back in  
4 September of 1971 was not to his liking either, that we  
5 should work for a different arrangement. So we agreed that  
6 we would exchange basically new proposals.

7 Mr. Oztemel sent me a letter some time after  
8 that in which he proposed really more of a joint venture  
9 which would involve a great deal of purchasing in Russia  
10 which would require financing basically from us to the tune  
11 of \$4,000,000, either from the standpoint of equity in a  
12 joint venture or a straight loan to this new venture.

13 This really was not to our liking and we  
14 countered with a contract proposal to Mr. Oztemel that  
15 probably would have been early June of 1973 which basically  
16 said we would like to make sure that you are not an agent  
17 and specify that.

18 That we would reimburse you for expenses plus  
19 a profit on those expenses, and that you would go with the  
20 right of first refusal on any barter arrangement.

21 This was basically the way the thing started  
22 and negotiations went back and forth and actually on many  
23 of those negotiations I was not a party to it and it was  
24 handled by our general counsel, Mr. Farr, and I believe  
25 also Mr. Hendricks was also involved in the detailed

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2                    negotiations. I was out a good deal of that time travelling.  
3                    That is the way we ended up with this.

4                    Finally the second contract, the concept being  
5                    instead of one overall umbrella, that there would be  
6                    basically a fee which was an all-inclusive fee rather than  
7                    the cost plus basis. Mr. Oztemel, I believe, was the one  
8                    who suggested this. I was not present at the time.

9                    It would be an all-inclusive fee for his  
10                  services on a continuing basis. It was not a fee which, as  
11                  far as I could tell, was ever very scientifically arrived  
12                  at through any mathematical formula. It was suggested there  
13                  would be a fee somewhere in the vicinity of 200 to \$250,000  
14                  a year based on past efforts, I guess, and what we might  
15                  expect in the future.

16                  At one point in that negotiation, I think it  
17                  was practically the final one, it was pointed out that under  
18                  the terms of the 1971 contract that we owed or would owe to  
19                  Satra the commissions on another order which we had obtained.  
20                  It was an order for a Model 158, a very large system, as a  
21                  reservation system for Intourist. It was in the amount of  
22                  \$10.5 million.

23                  Q            This is for the airline reservation service?

24                  A            Intourist. We never got an airline reservation  
25                  order, I am sorry to say.

2 But this was pending and was always subject to  
3 export license controls. In fact, as of right now it still  
4 is pending waiting export license from the United States.

5 Q IBM has never furnished that equipment?

6 A No.

7 THE COURT: It was pointed out to you that if  
8 the deal were consummated you would owe something to Satra?

9 THE WITNESS: Under the terms of the 1971 agree-  
10 ment we owed money to Satra. Mr. Oztemel suggested at the  
11 time because he had incurred a loss of expenses on our  
12 behalf that if we wouldn't object too much he would like to  
13 add that in as a part of the monthly fee to the monthly fee  
14 or monthly retainer, all-inclusive fee which we were agreeing  
15 to under this new contract.

16 So basically then it was written into the  
17 contract on the payment -- I guess there are really three  
18 pieces which would involve payment. One is the continuing  
19 payment per year which was \$200,000 per year.

20 THE COURT: \$16,000 per month?

21 THE WITNESS: Yes.

22 Q That is payment for the services rendered?

23 A This was the all-inclusive fee that Satra would  
24 pay to us for providing all of the services which he had  
25 been providing us in Moscow, that is, hotel rooms,

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2 reservations, visas, meeting us at the airport, translation  
3 services, a myriad of things. Also that included his  
4 consulting service which is his expertise in knowing Russia  
5 and knowing the Russian market, these types of things.

6 It was an all-inclusive payment to Satra on a  
7 continuing basis for the life of the contract which went up  
8 through 1976. Mr. Ontemel had suggested at one of those  
9 that we pick up this Intourist commission, three and a half  
10 percent on \$10.5 million and treat it as sort of an advance  
11 and that is the way it was written in the contract. We  
12 would start paying on that commission although we had not  
13 received payment in Russia.

14 Q In any event, that transaction is not closed  
15 and if you don't receive payment, does Satra have an obli-  
16 gation to refund that money?

17 A Yes. If something happens and the United States  
18 Government turns it down and it cannot be exported by the  
19 terms of that contract we have a claim to come back against  
20 Satra to be reimbursed for all moneys that we have given to  
21 them.

22 The third piece which involved payment was  
23 still sort of prospective and that would be on any type of  
24 contract which would involve barter or other types of  
25 financing.

2 Any time the Russians would say that, "Where do  
3 we get the foreign exchange to pay for your computers,"  
4 then under the terms of our agreement we were to turn that  
5 over to Satra and Satra was to provide that kind of service  
6 on any type of barter arrangement. This is how we came  
7 about to the second contract.

8 MR. HILL: I have no further questions of  
9 Mr. Witham.

10 THE COURT: Mr. Hellerstein.

11 CROSS-EXAMINATION

12 BY MR. HELLERSTEIN:

13 Q Under the original deal between IBM and Satra  
14 was it the case that the consideration for the administrative  
15 consultative and financial services that Satra was to perform  
16 for IBM was the commissions on sales that IBM agreed to pay  
17 to Satra and the \$50,000 characterized as an advance against  
18 commission and as a retainer?

19 A Under the terms and in the way that I understood  
20 it, the three and a half percent commission was to be an  
21 all-inclusive payment. All services except if they bought  
22 us airline tickets, straight out of pocket things like that.  
23 The \$50,000, I presume you are talking about the advances  
24 that we made early in the game, I believe in 1971, the fall  
of 1971?

2 Q Yes, October and December.

3 A We made a couple of payments as advances in  
4 anticipation of the commission which would be payable on  
5 the 360, Model 50, which we sold to the Chemical Ministry  
6 in the Soviet Union.

7 Q Those were sales out of the Leningrad Fair?

8 A Yes.

9 Q So, in other words, the \$50,000 that was paid to  
10 Satra was treated as an advance against the commission that  
11 would have been payable to Satra as a result of those sales  
12 of the IBM machine?

13 A That is the way I recall it. Again recognizing  
14 that Satra was spending money on our behalf and that it would  
15 be perhaps two or three months or four months or five months  
16 before we actually installed the equipment and received  
17 payment.

18 Q As I understand it, and correct me if I am wrong,  
19 Satra was not billing you for the expenses generally incurred  
20 in servicing the IBM contract. It was to devote those  
21 services and look to the commission revenue to be paid.

22 THE COURT: Except for out of pocket expenses.

23 MR. HELLERSTEIN: That is right.

24 A That is right.

25 Q Those services were administrative, financial,

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2 consultative, and whatever?

3           A     Yes. It included even services over on this  
4     side, for example, because Mr. Oztemel and other of his  
5     people arranged for escorting some of the Russian groups  
6     when they were over, such people as Mr. Patolichev,  
7     the Foreign Trade Minister, Mr. Alkhimov, Mr. Andreyev  
8     and Mr. Sushkov; all the people involved in the top level  
9     negotiations here and Satra then did a lot of the escort  
10    work with them and made sure that we had opportunities to  
11    talk with them and basically carry on our marketing  
12    activities.

13           Q     Does IBM have any negotiations going on looking  
14    for a possible sale of data processing equipment to Russia  
15    at the present time?

16           A     Yes.

17           Q     Would it be fair to say that the amount of  
18    dollars in those sales would be in excess, if the  
19    negotiations were successful, of \$1,000,000?

20           MR. HILL: Objection. I don't know what kind  
21    of relevance that kind of speculation would have here.

22           THE COURT: Overruled.

23           THE WITNESS: I couldn't even tell you. The  
24    contracts are things which we are bidding on or involved in.  
25    They range over a whole spectrum.

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2 THE COURT: Give us some idea of the scope.

3 THE WITNESS: The Kama River one could run as  
4 high as \$100,000,000. It involves selling a lot of not only  
5 the hardware, the equipment, but it's basically a lot of  
6 services where our systems engineers would actually be  
7 designing a lot of systems which would go into the foundries  
8 and this type of thing.9 There is a reservation system which I believe  
10 has been proposed. It has been discussed. I can't tell  
11 you the amount on that. I guess it would be similar to the  
12 Intourist system but this was for Aeroflot. There are  
13 discussions --14 THE COURT: Could you give us an order of  
15 magnitude in that?

16 THE WITNESS: I can't.

17 THE COURT: You said the Kama River, Intourist  
18 was \$10,000,000?19 THE WITNESS: Yes. Aeroflot might be the same.  
20 There is an air traffic control proposal that has been  
21 discussed which is basically the same as the FAA system  
22 here. That is what they were talking about. At one time  
23 that was talked about in turn with us acting as prime, and  
24 many subcontractors. This could have totalled somewhere  
25 with all the subcontractors probably somewhere in the

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2 vicinity of \$150,000,000.

3                   But that would be all the various prices of  
4 people making radars like Westinghouse, Raytheon, Sperry  
5 and so on.6                   Q     If you had not made the December 1973 agreement  
7 with Satra and one or more of these negotiations became  
8 successful before September 30, 1974 -- before September 21,  
9 1974, I take it that IBM would possibly have owed a commission  
10 to Satra measured by that three and a half percent?11                  A     If we had signed a contract, according to the  
12 way I would interpret the contract, if we had signed a  
13 contract with the Soviet Union for any one of those, Kama  
14 River, Aeroflot, what-have-you, then under the terms of the  
15 contract which we had with Satra then we would have owed  
16 them a commission of three and a half percent on the total  
17 value of each one of those contracts.18                  Q     Now because of the replacement contract of  
19 December 1973 I take it that that three and a half percent  
20 commission is no longer in effect, at least to your under-  
21 standing?22                  A     That is correct, three and a half percent com-  
23 mission would not be in effect. No commission would be in  
24 effect unless there was a barter transaction involved and it  
25 could be seven percent.

2 Q That would be an ad hoc basis?

3 A That is right, subject to negotiations.

4 Q Instead of that three and a half percent com-  
5 mision I take it that you now have a different method of  
6 compensating Satra for the administrative and consultative  
7 and financial services that you expect from it?

8 A This was the \$200,000 a year all-inclusive payment  
9 which is supposed to take care of everything.

10 Q Would it be fair to characterize those payments  
11 as a retainer for Satra's services?

12 MR. HILL: Objection. I think I have already  
13 made this point earlier.

14 THE COURT: I will sustain the objection there.

15 MR. HELLERSTEIN: I am not interested in the  
16 legal terminology now, your Honor. I'm interested in what  
17 the businessman's knowledge of these payments was.

18 THE COURT: I will allow you to ask the question  
19 in case I become dissuaded that it's relevant. At the moment  
20 I am not.

21 MR. HILL: I don't see how this witness could  
22 make a statement that would be binding on the defendants in  
23 this action.

24 THE COURT: I don't know that it would be, but  
25 I will hear it.

2 Go ahead with the question.

3 What is your understanding as a businessman as  
4 to what Mr. Hellerstein asked you?

5 THE WITNESS: A payment containing eight monthly  
6 payments for him to provide basically all the services on  
7 demand that we require, for him to provide the advice,  
8 counsel, which he has the expertise in.

9 THE COURT: You never talked about what it should  
10 be called?

11 THE WITNESS: It's just an all-inclusive fee, a  
12 monthly fee we were paying.

13 Q Mr. Witham, yesterday you were interviewed in  
14 your office by Mr. Hill and Mr. Simon and Mr. Fisher at the  
15 same time.

16 A Yes.

17 Q I wonder if you would tell the Court the way you  
18 expressed your understanding of what this fee was? How did  
19 you regard it?

20 MR. HILL: I object to this, your Honor. This was  
21 done yesterday afternoon as a cooperative effort to prepare  
22 Mr. Witham to come down here. There was no record kept.

23 I suppose some of the lawyers managed to take  
24 notes. I don't know that these notes have much bearing or  
25 whether they are relevant on what the witness now remembers

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2 happening yesterday afternoon. Indeed, when this whole pro-  
3 cedure was suggested as an effort to come in with Mr. Witham,  
4 who is not a party to this action, to get gymmed up on the  
5 facts and refresh his recollection.

6 I made a point that, one, he hadn't had to prepare  
7 even for the interview and that we ran a very real risk of,  
8 on cross-examination or indeed even on direct examination,  
9 having the lawyers try now to put back into Mr. Witham's  
10 mouth what they think he may have said or didn't say.

11 I must say that I am not sure this is really a  
12 legal objection. It seems to me rather unfair to the witness.

13 THE COURT: I don't think it's going to be  
14 embarrassing if Mr. Witham used a word yesterday when he was  
15 talking about it and uses a different word today and gives  
16 me a feel of the situation, if it's relevant and if it's  
17 binding, and I will give you some comfort, Mr. Hill, by  
18 saying that I am rather on your side with regard to those  
19 questions.

20 But let's hear what it is you want to ask.

21 A I thought about the same thing. I may have used  
22 some different words on the thing. I don't think my under-  
23 standing is any different as I have expressed it now with  
24 what I expressed yesterday afternoon.

25 I guess I could have called the thing almost any-

2 thing, a fee --

3 THE COURT: You were thinking in terms of  
4 retainers?

5 MR. HILL: Yes, we do, your Honor.

6 THE COURT: It sounds fancier and it's money up  
7 front.

8 Q Did you call it a fee?

9 A I could have called it a retainer fee. It's an  
10 all-inclusive fee as far as I'm concerned, to pay for services  
11 that we anticipated asking Satra Corporation to provide to us.

12 Q I didn't precisely catch your direct testimony.  
13 You referred to some arrangement on a cost reimbursement  
14 plus 20 percent fixed fee arrangement. Who was it who  
15 suggested that, IBM or Oztemel?

16 A I think I suggested it to Mr. Oztemel during our  
17 first luncheon, the way I recall it. And it actually had  
18 come from some of our people in-house.

19 Q Did IBM ever go into the cost that Satra said it  
20 was incurring in the servicing of IBM?

21 A Not to my knowledge.

22 Q With respect to the services that were withdrawn  
23 in that submission that Mr. Stafford made for you --

24 THE COURT: Services that were withdrawn?

25 MR. HELLERSTEIN: I will put it again. I wanted

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2 to withdraw a partial question.

3 MR. HILL: May I ask Mr. Simon to voice our  
4 objection to this. It goes directly to the very issues  
5 raised in connection with the exhibits that Mr. Simon put  
6 into evidence.

7 MR. SIMON: Your Honor, I call the Court's  
8 attention to the fact that the Satra Corporation has proffered  
9 for the Court's review its actual expenses which was accepted  
10 by the Court. Under the circumstances that if the opposition  
11 wished to question it whatever, they would have an opportunity  
12 to do so, but I note for the record that if Mr. Hellerstein  
13 wants to pursue this line on cross-examination it seems to  
14 me we should have an opportunity to take the exhibit and ask  
15 the witness what it covered and what his anticipations were  
16 and so forth.

17 I had understood the Court didn't want to con-  
18 tinue on that line. For that reason I object to the question.

19 THE COURT: I will ask Mr. Hellerstein whether  
20 he is asking about the same kinds of things that he said  
21 earlier they were irrelevant.

22 MR. HELLERSTEIN: I think I am, and since the  
23 point was raised on direct I wanted to ask them, but they  
24 are not terribly crucial questions.

25 THE COURT: I prefer to stay away from the

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2 questions of expense.

3 MR. HELLERSTEIN: All right.

4 Q In any event, Mr. Witham, is it accurate that in  
5 the various drafts that IBM submitted to Satra that the pro-  
6 visions that were made was not for a cost plus arrangement  
7 but for a flat monthly fee arrangement, is that correct?

8 A I can't answer that directly.

9 THE COURT: That is where it ended?

10 THE WITNESS: No, sir, I think he ended up with  
11 cost plus.

12 MR. HELLERSTEIN: I will put the question again.

13 Q Is it the fact that in the various drafts that  
14 were submitted by IBM to Satra the compensation arrangement  
15 that was proposed by IBM was a flat monthly fee and not a  
16 cost plus arrangement?17 A I can't really address that because I don't know  
18 that I saw every one of the drafts.19 THE COURT: Whoever is listening, I really can't  
20 say that this is important. I know what your objections  
21 were.

22 MR. HELLERSTEIN: Thank you, Mr. Witham.

23 THE COURT: Anything further, Mr. Hill?

24 MR. HILL: No.

25 THE COURT: Thank you.

2 (Witness excused.)

312 3 MR. PATERSON: Could I have a moment, your Honor,  
4 to confer with IBM counsel to see whether there is anything  
5 they would like stated for the record?

6 THE COURT: Yes, you may.

7 MR. PATERSON: We have nothing.

8 MR. SIMON: It would be our position to call  
9 Dr. Stern as an adverse witness and rather than be involved  
10 with a short examination now, it might suit the witness to  
11 recess for lunch.12 THE COURT: You don't have any further IBM  
13 witnesses?

14 MR. SIMON: No.

15 THE COURT: I would like to hear what Dr. Stern  
16 is going to say for himself too.17 If you want to do it that way, we will adjourn  
18 now and come back at a quarter of two.19 I do want to say this: I expect to end by five  
20 o'clock this afternoon.21 MR. SIMON: I don't think it will take any longer  
22 than that.23 MR. HILL: Can I give to the law clerk on or off  
24 the record the citations I referred to this morning?

25 THE COURT: Sure, whichever way you prefer.

(Luncheon recess.)

## 2 AFTERNOON SESSION

3 (2:00 p.m.)

4 THE COURT: Dr. Stern, I gather you are being  
5 called.

6 MR. SIMON: Yes, sir.

7 THE COURT: Dr. Stern, I remind you that you are  
8 under oath.xvx 9 M A R V I N S T E R N, called as a witness on behalf of  
10 the defendant, having previously been duly sworn,  
11 resumed and testified further as follows:

## 12 DIRECT EXAMINATION

13 BY MR. SIMON:

14 Q Dr. Stern, as an overview of the contractual  
15 negotiations leading up to the August 31 contract, I take it,  
16 do I not, that it was your intention to be a joint venturer  
17 or partner as opposed to an employee?

18 A That is right.

19 Q And that the words "joint venturer," where they  
20 appear, and "partner," where they appear, were put in at your  
21 instance because you wanted to avoid categorization as an  
22 employee?

23 A That is partly right.

24 THE COURT: Are we referring to specific documents?

25 MR. SIMON: I am going to, your Honor.

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4 THE COURT: That may be better.

5 Q Going from the general to the specific, Dr. Stern,  
6 it is a fact, is it not, that you prepared what has been  
7 introduced and received as Plaintiff's Exhibit A?

8 A That is right.

9 Q Dr. Stern, in Plaintiff's Exhibit A which was,  
10 as I understand it, the first written effort to formalize  
11 your negotiations with Satra, it is stated in paragraph two  
12 that whatever benefits are derived from these efforts will  
13 be shared equally by the partners, is it not?

14 A Yes, sir.

15 Q And that language was of your choice?

16 A Yes, it is.

17 Q That concept of joint venturing or partnership  
18 was carried forth at your request through Plaintiff's  
19 Exhibit B and C, was it not?20 A The concept, yes, with some very minor modifi-  
21 cation which might be significant.22 Q I appreciate that and that is why I told you in  
23 the beginning this is an overview. We are not talking about  
24 peculiar semantics. Do we understand each other?25 A I am not talking about semantics. I am talking  
about in paragraph one of Exhibit A I also used the words  
"their joint best efforts." Those words I also used in

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2 Exhibit B which I was involved in. Exhibit C, which was  
3 offered to me, left those words out.

4 Q You are commenting now that the words "joint  
5 best efforts" are not involved in Exhibit C, is that  
6 correct?

7 A Yes, sir.

8 MR. HELLERSTEIN: Objection to the form. They  
9 are not in it. The question of involvement is something  
10 different.

11 THE COURT: All right.

12 Q As joint venturer or partner -- and I will tell  
13 you now that I will use those terms interchangeably -- was  
14 it not a fact that you accepted the risks of the venture?  
15 If it was good you shared, if it was not, you lost?

16 THE COURT: You mean lost in the sense of actually  
17 having an out of pocket loss or not getting anything?

18 MR. SIMON: I am going to get there. We are  
19 trying to get an overview of what his concept was.

20 A I took a certain risk and we would have to define  
21 what the risk and what the losses were but otherwise, yes,  
22 you are right.

23 Q So where it states in the exhibits that you were  
24 going to share in the benefits, you were likewise to at least  
25 some extent committed to the idea that you might have to share

2 in the detriments if there were detriments?

3 MR. HELLERSTEIN: I object to the form. I  
4 appreciate this is an overview but by Mr. Simon pressing the  
5 questions you are leading the witness to a lot of legal con-  
6 clusions which may be beyond what he was originally thinking  
7 of doing and is certainly beyond what he and Mr. Oztemel  
8 and others in Satra were stating they were doing. It seems  
9 to me they are both irrelevant and objectionable.

10 THE COURT: I won't accept the testimony of  
11 Dr. Stern as a legal conclusion. I have not determined, and  
12 you will have to determine hereafter, the extent to which I  
13 think that the attitude, if you want to call it that, or the  
14 concepts or the views of either of the parties towards what  
15 their contract meant is controlling indicates as it now  
16 stands. But the thing I have not yet determined is that  
17 I will hear what Dr. Stern thought was on the negative side  
18 for him, as well as what he thought was on the positive side.

19 MR. HELLERSTEIN: Since I broke into the testimony  
20 I gather Mr. Simon is going into the question of mitigation  
21 of damages which has been briefed by your Honor. I want to  
22 state my objection to the line of testimony on that point.  
23 I understand your Honor's ruling.

24 THE COURT: I think it would be better to char-  
25 acterize it as asking the witness what he thought would be

2 possible -- at least I want to assume his concept -- what he  
3 thought the risk of loss was and not just leave it hanging,  
4 that there might be losses because that word can be construed  
5 in a lot of different ways.

6 MR. SIMON: If the Court please, I will respond  
7 only by saying that we have been engaged in a long trial  
8 and we are all of us too familiar with the record, but I am  
9 going to try to get from this general overview of joint  
10 venture or partnership, if you will, to what specifically  
11 was meant by it.

12 Q Dr. Stern, what were --

13 MR. HELLERSTEIN: One more thing here. I take  
14 it that we are involved here not in a review of what the  
15 jury has decided was the agreement but somehow related to the  
16 questions that are involved here, namely what the damages  
17 are under this jury verdict.

18 Mr. Fisher, I gather, understands his testimony  
19 a different way from what I understand what Mr. Simon was  
20 driving at. I gather that we may be involved with issues  
21 that are extraneous.

22 THE COURT: Let's let Mr. Simon proceed subject  
23 to motions to strike and objections to the questions. I  
24 wouldn't be authorized to redecide what the jury has decided.

25 MR. SIMON: If we can have a little running room

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2 we can get to something.

3 Q Dr. Stern, I notice that the beginning exhibit  
4 said you were going to share the benefits. It did not say  
5 anything about the detrimen~~ts~~s that you testified you assumed  
6 some risk. My question now is what risk did you assume?

7 THE COURT: By virtue of which document?

8 MR. SIMON: The August 31, which, as I see it,  
9 was the culmination of these series of negotiations.

10 THE COURT: If everybody agrees, yes.

11 A I was risking becoming a partner with a firm who  
12 had already, in my eyes, displayed marginally ethical conduct.

13 Q Would it be fair to state that because of this  
14 marginally ethical conduct you were risking sharing in the  
15 loss if they got sued for it, as strictly by hypothesis, if  
16 IBM sued them for misconstruing their role in Russia?

17 A No.

313 18 Q What risks did you assume, Dr. Stern?

19 A For better or for worse I get by on having a  
20 certain of perhaps some capability, some integrity, what-  
21 have-you, and basically I was in the field of providing con-  
22 sulting advice.

23 My reputation fundamentally is my stock in trade.

24 Have I answered you?

25 Q Yes.

2 Follow that for a moment. Your reputation, that  
3 is. That which you can truthfully tell people you are  
4 knowledgable in is your stock in trade?

5 A That is not quite it. To give an example, I  
6 have been honored that if I want to speak to someone he will  
7 usually see me because he knows I would not be kidding him.  
8 I would not be wasting his time. That is what kind of repu-  
9 tation I mean.

10 Q Is it not a fact that, for example, in soliciting  
11 business as a consultant, you would very logically tell your  
12 prospective employer that you were knowledgable and  
13 experienced in Soviet affairs or something like that?

14 A No, that isn't the fact at all.

15 Q So that is not the type of reputation you were  
16 talking about?

17 A No.

18 Q Is it your understanding, Dr. Stern, that under  
19 the agreement you made with Satra Corporation you were  
20 entitled to profits even though they suffered losses?

21 A We are speaking now about Exhibit C?

22 Q Yes, sir, as a partner.

23 MR. HELLERSTEIN: I object, your Honor. This is  
24 calling for a legal conclusion.

25 THE COURT: Mr. Simon, I don't really understand

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2 what this has to do with the question of damages. Will you  
3 either, at the side-bar or otherwise, explain to me what  
4 you are trying to establish?

5 MR. SIMON: I am trying to establish that  
6 Dr. Stern was a joint venturer or partner by his own  
7 admission which seems to me he was. In the interpretation  
8 of the agreement the Court must bear in mind that it should  
9 be fair and equitable as between the partners. That is all.

10 THE COURT: I don't see what difference it makes  
11 what he thought about that. That may be a good argument but  
12 if it's a good argument it doesn't depend on whether  
13 Dr. Stern thought he was going to get profits when they got  
14 losses or not, does it?

15 MR. SIMON: I believe it does. I believe it  
16 applies directly to the issues of how the expenses are  
17 allocated. It's our position that throughout Satra was  
18 entitled to a fair break no matter which way it went. I am  
19 asking whether he had any other interpretation.

20 MR. HELLERSTEIN: Our job is to construe a con-  
21 tract and not to deal with general amorphis notions of what  
22 is fair and equitable.

23 THE COURT: Yes, I do, too, except to the extent  
24 that in construing the contract there may be presumptions  
25 that people intend to act in a certain way which may be

2 considered fair and equitable, but not just because it's  
3 fair and equitable. If I decide that the parties intended  
4 to act in some other way that is that.

5 MR. HELLERSTEIN: I would accept that. This is  
6 the point. The point is to draw up a schedule of incremental  
7 annual revenues and annual expenses. The jury has decided  
8 that has to be interpreted in a certain way and that was a  
9 material part of the contract, that there was a contract.

10 It's now not up to any one of us to say that  
11 that was not fair or not equitable and not to argue it one  
12 way or the other.

13 I think it's fair and equitable and Mr. Simon  
14 may think not. We think it's irrelevant.

15 MR. SIMON: Let me state of record that I do not  
16 think the jury's verdict necessarily means that the contract  
17 must be interpreted exactly as Dr. Stern or his lawyers do.

18 THE COURT: I want to make it clear that I haven't  
19 studied the jury's verdict with reference to this question so  
20 as to come to a conclusion as to whether this verdict  
21 necessarily decides the question as to how the expense clause  
22 or schedule is to be interpreted or whether it merely is to  
23 be interpreted to mean that there was an agreement of the  
24 parties on that point.

25 The latter the jury clearly decided. They clearly

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2 decided that they had an agreement.

3 MR. SIMON: Your Honor made that statement from  
4 the bench several times as well as in the charge. The jury  
5 might well decide the agreement covered such points to con-  
6 stitute a meeting of the minds and where they didn't agree  
7 it wasn't material. That is a matter of interpretation.  
8 We now have a contract and the Court must interpret it.

9 THE COURT: Mr. Hellerstein, so we don't go on  
10 this way, which isn't very productive and I know you want to  
11 be productive here too, fortunately, and very fortunately,  
12 I think this is a non-jury proceeding. There are a lot of  
13 tricky questions here and they are going to require reflection  
14 from me and if you people want further reflection in which  
15 after today's proceedings you want to give me further thoughts  
16 of your own, I will be glad to receive them.

17 I think the best way to proceed is for everybody  
18 to make clear on the record what his position is as to what  
19 the significance of the proceedings so far are and where we  
20 are at and what I ought to look at or what needs to be proven.

21 But I think that having done that, Mr. Simon or  
22 the defendants, and I say it only because the plaintiff  
23 doesn't wish to give them in a group, should be able to put  
24 in such proof as they wish, subject to any objections or  
25 motions to strike so we can move along.

2 MR. SIMON: If the Court please, in my experience  
3 this is a trial before the Court and it goes without saying  
4 that your Honor will disregard any portion of it which is not  
5 material.

6 Q Dr. Stern, what expenses, as you viewed it on  
7 August 31, were to be covered under the agreement figure of  
8 \$100,000?

9 MR. HELLERSTEIN: Objection to the form of the  
10 question. I don't think there was any testimony that Dr.  
11 Stern had or anybody else had that it was an agreed figure  
12 of \$100,000.

13 THE COURT: The figure referred to in the  
14 schedule is \$100,000.

15 MR. SIMON: We are not going to be able to pro-  
16 ceed if we are going to argue over each one of the questions.

17 THE COURT: I corrected the form of that.  
18 Repeat the question.

19 Q In the schedule attached to what was received  
20 in evidence as Plaintiff's Exhibit C, which is the contract  
21 dated August 31, 1971, there is a schedule with an incremental  
22 expense factor of \$100,000.

23 A Yes, sir.

24 Q What expenses would that cover?

25 A That schedule was arrived at in lieu of actuals.

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2 I have said that several times here before even to the point  
3 of raising my voice and getting reprimanded for it.

4 THE COURT: We understand that, Doctor. We  
5 know it was in lieu of actuals. But how was it to work?

6 Q The first question is: what was it to cover?  
7 That is the testimony is very clear, the parties had a dis-  
8 cussion about the fact that Satra would necessarily incur  
9 expenses. They then had a discussion about whether or not  
10 it was feasible for Dr. Stern to audit those expenses.

11 Satra said it was not, Dr. Stern agreed, but my first  
12 question, the threshold question is: what were the expenses  
13 not by number?

14 A I shall answer that, thank you.

15 In lieu of actuals the agreement was we would  
16 establish beforehand an expense reimbursement schedule to be  
17 a function of revenues.

18 THE COURT: Dr. Stern, I know this from the  
19 testimony and I think we all do. I don't think this is  
20 responsive to the question.

21 The question is: what kind of expenses did you,  
22 or what kind of expenditures -- put it that way -- do you  
23 understand the agreement to have covered as expenses which  
24 would fall or be covered by this?

25 THE WITNESS: I thought I answered that earlier

2 when I testified to the discussion Mr. Oztemel and I had  
3 and the reason why he added at the end of the agreement that  
4 the retainers would not be subject to the extension schedule  
5 but would be divided 50-50 and the rationale which I am sure  
6 I offered was the following --

7 THE COURT: Can't you tell me in so many words  
8 what kind of expenses?

9 THE WITNESS: The expenses were those that were  
10 to be associated with the actual sales and the commissions  
11 thereon. Those were the future income items. That is why  
12 we agreed. The current income items, namely retainers or  
13 advances, aren't under the schedule.

14 Q I am going to interrupt you.

15 You can say that as many times as you want and  
16 the court reporter will write it down, but the question is:  
17 what categories of expenses were covered in the negotiations  
18 which led up to the figure of \$100,000?

19 THE COURT: Let me try and make it easier.

20 As I understand Mr. Simon's question, and if I  
21 understand it correctly, I consider it proper and I do not  
22 consider it has been completely answered in any way.

23 It would relate to the kind of testimony that we  
24 heard from Mr. Witham when he was talking about the kinds of  
25 expenses in his new agreement that would be covered. What

2 kind of expenses did you interpret your agreement to cover?

3 THE WITNESS: My understanding was that that  
4 expense schedule was associated with some kind of expenses  
5 that Satra would have with barters which would be associated  
6 with actual sales; that to be distinct from current income.

7 THE COURT: Supposing they maintained an office  
8 in Moscow which might have something to do with barters, it  
9 might have to do with a lot of other things, consultation,  
10 introducing somebody to somebody else, and they had a phone  
11 bill and this and that and the other. Are those the kinds of  
12 expenses that you understand were covered -- not covered,  
13 but I understand it didn't relate to actuals, but that this  
14 was in lieu of?

15 THE WITNESS: I can agree with part of what you  
16 said, not all. I am sorry.

17 THE COURT: You don't have to agree with what I  
18 said. Just tell me what you think.

19 MR. SIMON: Let me go down list by list.

20 What about hotels, hotel rooms?

21 MR. HELLERSTEIN: Let's let one question be  
22 answered first.

23 A I will answer the hotel office. I will answer  
24 that specifically. Satra in 1971 did not have an office in  
25 Moscow. So I don't understand the question.

2 Q This was a long term contract and the question  
3 would make sense if they opened an office the following year.  
4 The question would be whether that was the kind of expense  
5 in lieu of which this incremental clause was supposed to  
6 operate.

7 THE WITNESS: I really think you are asking me a  
8 question beyond my capability of answering. My interpretation  
9 was distinct from current, the retainers or advances which  
10 would take care of the administrative expenses, as distinct  
11 from those things the expense schedule was applicable to  
12 efforts that Satra would have associated with barters to  
13 actually convert the sale to western currency. That was my  
14 understanding.

15 Q All right, Dr. Stern.

16 Mr. Reporter, I apologize because I don't know  
17 your name, but would you read back slowly the witness'  
18 answer to that question.

19 (Answer read.)

20 Q Is it your position that Satra would recoup  
21 these administrative expenses from the retainers?

22 A Their share of the retainers, their half of the  
23 retainers they would use however they want. I don't know  
24 how they would use them.

25 Q Now, sir, let me be sure I understand. You are

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2 saying, are you not, that the administrative expenses were  
3 such things as the hotel room, the translators, the travel  
4 service, and what-not?

5 MR. HELLERSTEIN: If your Honor please, I object.  
6 The witness in all these series of questions is being asked  
7 to interpret the agreement which is not what I think he  
8 should be asked to do. Dr. Stern said he is being asked that  
9 beyond which he is capable of answering.

10 THE COURT: If he wants to stand on that answer  
11 alone, if you mean he doesn't know the answer to the question  
12 he can say so.

13 THE WITNESS: I am afraid I have to. Otherwise  
14 I'm going to be argumentative in areas that I really don't  
15 understand. I am sorry.

16 Q I don't mind your arguing with me. You are not  
17 going to hurt my feelings.

18 My specific question is this: you have divided  
19 the expenses in your testimony today in two general categories.  
20 One relates to barters. I am going to call those financial  
21 expenses.

22 The other relates to administrative expenses,  
23 is that correct?

24 A Not quite.

25 MR. HELLERSTEIN: Objection. We are getting

2 involved in a semantic argument construing this agreement. I  
3 think he is a witness who ought to be asked questions that  
4 are addressed to witnesses and not to lawyers.

5 THE COURT: I am going to overrule your objection  
6 Mr. Hellerstein. If this illuminates the situation for me  
7 I want it. If not, I will disregard it.

8 A I am familiar with the fact that I have a need  
9 for current income and my half of the retainers or advances  
10 were supposed to help me toward that end. That was the under-  
11 standing I reached with Mr. Oztemel and it's there in his  
12 handwriting.

13 How his half of the retainer was to relieve him of  
14 his financial burden, I am afraid I cannot answer that.

15 THE COURT: Dr. Stern, let me intervene here.

16 You people are calling upon me to do quite a job  
17 which is to figure out what this schedule means. Each of you  
18 contends something different. One of the items which may be  
19 relevant to my determination as to what this means is what  
20 the respective parties have to say as to their interpretation  
21 of it. It doesn't bind me, I realize that, and I am fully  
22 aware. And, Mr. Hellerstein, I understand that a cardinal  
23 proposition in the construction of contracts is that if it's  
24 construable on its face it must be construed on its face.

25 But there is at least an argument as to ambiguity

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4 here so, therefore, I am willing to hear testimony on it.

5 Now, in this column I understand what the word  
6 revenue means. Revenue can refer to sources of income,  
7 right?

8 THE WITNESS: Yes, sir.

9 THE COURT: You have been talking as much about  
10 sources of income as anything else. I am not interested in  
11 that question of sources of income. I want to know what kind  
12 of expenditure Satra would have to make, in your opinion,  
13 to get any credit for the figures that are referred to over  
14 here. For example, if Mr. Oztemel were to buy a chocolate  
15 soda in New York at Schrafft's, having nothing to do with  
16 IBM it would have no reference to this.17 In other words, there would be certain kinds of  
18 expenditures, I assume, on the part of Satra which you would  
19 agree that they were to receive some credit for. It's not  
20 responsive to say I don't care what they do with their money.  
21 The question we are talking about is what comes off the top.22 THE WITNESS: I understand. The easiest way I  
23 can answer is the written stuff a. the bottom where we hear  
24 50-50 on the retainers. That I have no visibility on. The  
25 schedule you speak of, it was my understanding that associated  
with sales there will be barters, perhaps even Mr. Oztemel  
would have to pay off someone. That I don't know. But he

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2 would have some financial expenses associated with that end  
3 of the activity.

4 THE COURT: Sales?

5 THE WITNESS: What is right.

6 THE COURT: I take it when you say associated  
7 with sales there might be some expenses, you would have  
8 anticipated whatever is normal in business practice would be  
9 charged?

10 THE WITNESS: His end of it, absolutely.

11 Q Does that include hotel rooms, translators, and  
12 the various services involved in running the travel agency  
13 over which we have had a lot of testimony?

14 A I would have thought he would cover much of that  
15 out of the 50-50 split of retainers. You remember, this was  
16 before we had an agreement with IBM and we were hoping for  
17 high retainers.

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18 MR. HELLERSTEIN: Could the witness be questioned  
19 to answer as to only his knowledge and not to surmise what  
20 Mr. Oztemel may have done in treating his own affairs, if you  
21 know, answer it.

22 THE COURT: His knowledge or his actual belief  
23 as to what was intended at the time, not what he would have  
24 thought but what he did think.

25 MR. SIMON: I wouldn't quarrel because obviously

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4 I am in the presence of a more than experienced jurist, but  
5 it's a little unusual for the plaintiff's counsel to ask the  
6 Court to tell the witness not to testify as to his range of  
7 knowledge.

8 THE COURT: You may not want your client to say  
9 something he doesn't know anything about.

10 Q Your answer is no as to whether the translators,  
11 the hotel workers --

12 A That is not my answer. I didn't say that.

13 THE COURT: I think he made an answer which  
14 satisfies me although it doesn't satisfy either lawyer.

15 MR. SIMON: It satisfies me if it is the truth.

16 Q Dr. Stern, I want you to look at the agreement,  
17 paragraph C, which says, as I read it that all expenses for  
18 the project will be advanced by Satra to be recouped out of  
19 earnings.

20 Is it your testimony that that provision did not  
21 cover the translators, the hotel rooms, and the other  
22 amalgamation of incidental administrative expenses amounting  
23 to over \$100,000 a year which Satra incurred?

24 Before you answer that, your Honor, the figure of  
25 \$100,000 appears in the exhibit which the Court has con-  
ditionally reserved judgment on. We think it's material on  
this issue. But I point out it is not in evidence. That is

2 just what is on the proffered exhibit.

3 MR. HELLERSTEIN: I object to the question first,  
4 as to form, because it's loaded and argumentative. Secondly,  
5 I object to the question because again we are asking the  
6 witness to construe paragraphs of the agreement which I don't  
7 think --

8 THE COURT: I know we are. I am allowing it at  
9 this time because, as I have said before, I think it's at  
10 least an argument that can be made since there is an ambiguity  
11 which remains in the situation and if I conclude there is  
12 ambiguity which remains, I want to know what the parties have  
13 to say.

14 MR. HELLERSTEIN: Then any discussions that were  
15 had between the parties would certainly be admissible to  
16 clear up an ambiguity if they do, in fact, clear up an  
17 ambiguity. Otherwise, this is all a matter of argumentation  
18 for the lawyers and I can't see that a witness' private recol-  
19 lection or understanding, which is even worse, of what a  
20 particular phrase means has any bearing on the question or  
21 any utility for us.

22 THE COURT: I sustain your objection as to the  
23 latter part. I think you are free to ask Dr. Stern what  
24 discussions were had with regard to paragraph C and to go on  
25 from there.

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2 MR. SIMON: Could we be heard just a moment on  
3 that? If I have ever seen an ambiguity in a contract it is  
4 the statement on the face that all expenses are to be  
5 recouped and the testimony by parties thereto that that  
6 doesn't mean what it says.

7 It seems to be perfectly material to this to ask  
8 Dr. Stern what it does mean, if it doesn't mean that all  
9 expenses are to be recouped out of earnings. I am not trying  
10 to get his legal opinion.

11 THE COURT: You can ask Mr. Hellerstein what it  
12 doesn't mean, if you want. Dr. Stern's opinion on the subject  
13 wouldn't be as significant to me as Mr. Hellerstein's. If  
14 you want to ask him why he says it doesn't cover something,  
15 there is some actual fact that has occurred that prompts him  
16 to say that, I will accept that.

17 Ask him why he takes the view he does about para-  
18 graph C.

19 THE WITNESS: If I may continue the sentence you  
20 asked, because that gives me the answer, it says all expenses  
21 for the project will be advanced by Satra to be recouped out  
22 of earnings, if any. That is why my curve has to start at  
23 zero, if any. That is a mathematical expression which I  
24 understand.

25 THE COURT: Let me ask you, Dr. Stern, I under-

2 stand that to a mathematician the phrase "if any" would be  
3 a mathematical concept, but it could be a legal concept too.

4 Do you say what you say because you have talked  
5 about this phrase with anybody at Satra or do you say this  
6 merely as a matter of your own logical approach to the  
7 situation?

8 THE WITNESS: This was my best understanding  
9 at the time from discussion and from the words, and my under-  
10 standing.

11 THE COURT: Will you tell me what discussion you  
12 had to which you are referring?

13 THE WITNESS: Yes, we discussed --

14 THE COURT: "We" being you and who?

15 THE WITNESS: Hanno Mott and Bill Hermann when  
16 this schedule first was discussed relative to the earlier  
17 agreement. This schedule was first introduced and discussed  
18 with me relative to their effort to modify the August 25  
19 agreement. They wanted to attach this schedule. There  
20 we discussed very, very clearly that the meanings of the  
21 words incremental, meaning that zero revenues, zero expense  
22 reimbursement as revenues begin to come, there would be some  
23 sharing. My share being reduced somewhat by the recoupment  
24 according to the pre-arranged schedule. These words here  
25 were not prepared by me but they meant to me that there was

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2 a clear understanding of what I have just now said.

3 Q Did you not agree, Dr. Stern that the \$100,000  
4 would stand in lieu of actual figures, in lieu of an audit  
5 and in compensation to Satra for all its expenses?

6 A No, sir, never.

7 Q With whom did you have a contrary agreement?

8 A If that were so it would begin --

9 MR. HELLERSTEIN: Objection.

10 THE COURT: I will sustain the objection as to  
11 form.12 MR. HELLERSTEIN: I might say, your Honor, the  
13 testimony that Dr. Stern just gave was reviewed by the jury  
14 specifically. They came back and they asked to hear what  
15 Dr. Stern had said in connection with this expense schedule.16 This was pursuant to your Honor's instruction  
17 and Mr. Hill's argument and my argument and it's discussed  
18 in Point I of the memorandum we handed up as to whether or  
19 not there was a meeting of the minds on the question of this  
20 expense schedule, and the jury, in giving a verdict for the  
21 plaintiff, necessarily had to find that there was a meeting  
22 of the minds. We are going over and rehashing exactly what  
23 this trial was supposed to decide.24 THE COURT: I quite agree with you that the jury  
25 had to find there was a meeting of the minds. What I am not

2 in a position to say, at the moment, is that it necessarily  
3 follows, although it may well follow that the only conclusion  
4 they could have come to was that Dr. Stern's version is the  
5 one about which there was a meeting of the minds. That  
6 observation is made merely because I haven't had an opportunity  
7 to study the record and consider it.

8 MR. SIMON: May I go on to the next question and  
9 come back and address myself to that point?

10 Q If, in fact, Satra incurred no expenses as a  
11 result of financial transactions were they entitled to  
12 \$100,000 credit against \$250,000 revenue if earned?

13 A Yes, according to the schedule here.

14 Q Does it not then follow that the \$100,000  
15 encompassed all of their expenses?

16 A I don't know.

17 MR. HELLERSTEIN: Objection to the form of the  
18 question.

19 THE COURT: Overruled. He says he doesn't know.

20 Q You don't know?

21 A No.

22 Q It is your testimony, is it not, that Satra was  
23 to look to retainers or its half of the retainers to recoup  
24 some of these very substantial administrative expenses?

25 MR. HELLERSTEIN: I object to the form of the

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2 question and the relevance. The question is being asked to  
3 construe the agreement.

4 THE COURT: Mr. Hellerstein, you have an objection  
5 all the way through. I won't be corrupted by the views of  
6 Dr. Stern if he has any.

7 MR. HELLERSTEIN: It seems to be unfair to the  
8 witness to ask him to be a lawyer.

9 THE COURT: Overruled. If you can answer the  
10 question, you may.

11 (Question read.)

12 A I don't understand the meaning of the word  
13 "very substantial administrative" --

14 THE COURT: These expenses, then.

15 Q Financial expenses.

16 A Just like my half were enable me to live, I  
17 would assume Mr. Oztemel would use his half to continue to  
18 maintain his chauffeured Rolls Royce in London, New York and  
19 elsewhere in the world. What else, I don't know.

20 Q Dr. Stern, there is no jury here so we don't have  
21 to get into that.

22 A I don't know.

23 Q Dr. Stern, you do know, do you not, from hindsight  
24 if not from foresight, that the cost of operating the office  
25 was about \$100,000 a year?

2 A Oh, no, sir.

3 THE COURT: Mr. Simon, I am going to cut you off.  
4 We've gotten as far as we are going to get in getting a feel  
5 of what Dr. Stern's approach to the situation is. You lawyers  
6 are free to argue about the reasonableness or unreasonableness  
7 of that if it is still left in the case and the jury has  
8 already decided it.

9 I thought today's testimony was going to be,  
10 and I think it will have to be sooner or later a question of  
11 establishing what needs to be established unless it's already  
12 in the record, what moneys have come into Satra as a result  
13 of this venture; what moneys have been paid by Satra as a  
14 result of his venture and then such testimony as falls  
15 within my concept of what is relevant on the mitigation of  
16 damages, to wit, the theory espoused -- not espoused, but  
17 articulated in the plaintiff's recent memorandum.

18 I think Miss Martin advised you that I agreed  
19 with Mr. Hellerstein's theory about mitigation of damages  
20 but it did not seem to me to preclude the possibility that  
21 defendants could put in some evidence to show that this  
22 venture might yet fall within that theory.

23 MR. SIMON: If the Court pleases, I accept the  
24 Court's limitation and I agree that where we have come so far  
25 is to conclude that Dr. Stern and I do not agree. We will go

2 on to the next thing.

3 Q Dr. Stern, you do know when you signed the  
4 agreement on August 31 that the retainers from IBM would be  
5 nominal, did you not?

6 A Negative.

7 THE COURT: No, you did not?

8 THE WITNESS: No, I didn't know.

9 Q When did you learn that the retainers from IBM  
10 would be very nominal?

11 A Let me go through it in my mind. August 31 we  
12 had had no negotiations with IBM. September 9 there was a  
13 Satra memorandum speaking of a couple of hundred thousand,  
14 \$500,000 worth of retainers. We didn't know until September  
15 17 in Mr. Witham's office.

16 Q I am going to read to you, for the purpose of  
17 refreshing your memory, from a portion of your own counsel's  
18 brief in this matter beginning at page 157 of the transcript.  
19 It is your testimony on direct examination at the instance  
20 of your counsel:

21 "Q This was at this lunch?

22 "A Yes.

23 "Q And I think you said September?

24 "A September 8 here in New York.

25 "Q What did Mr. Stafford say to you?

2 "A He thought it would be a good technique" --  
3 and I will skip a little bit there to put you back in the  
4 picture.

5 Then the question was asked by your lawyer:

6 "Q What did you say about that?

7 "A I said we would expect some kind of  
8 retainer. He said, well, that may be awkward for IBM, they  
9 are used to giving commissions but maybe or maybe not on  
10 retainers. I backed off. I said all right. We would like  
11 a showing of good faith on the part of IBM. We would like  
12 to see at least a nominal retainer and if that could not be  
13 so you could make that an advance against commissions, but  
14 we want some current early incomes."

15 Does that refresh your recollection?

16 "A That is exactly right on September 9, the day  
17 after September 8. I received a memorandum at the Satra  
18 office which instructed me that they were looking to several  
19 hundreds of thousands of dollars a year for the retainer.  
20 As a result, at the September 17 discussion at Mr. Witham's  
21 office I did not carry the burden of the discussion of  
22 retainers. I stayed out. Everything you have said is right  
23 and everything I have said is right.

24 "Q So on September 8 or at your lunch with Stafford,  
25 who was then an IBM employee, you agreed to the proposition

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2 that there would be a nominal retainer?

3 A Yes, sir, I was willing.

4 Q And that is the philosophy that was followed  
5 throughout this series of negotiations?6 A Negative. No, sir, I just said September 9 I  
7 was given a written memorandum saying exactly otherwise.8 Q Disregarding for the moment, Dr. Stern, the  
9 question of the internal memorandums, the fact is that IBM  
10 paid a nominal retainer, did they not?

11 THE COURT: That is in the record.

12 Q And the retainer which you asked for was an  
13 advance before commissions were earned, was it not? That is  
14 the way you described it in your conversations.

15 THE COURT: That is not disputed either.

16 MR. HELLERSTEIN: Also, it's irrelevant because  
17 the document between Dr. Stern and Satra that is supposed to  
18 inform the whole proceeding is preceding in time these conver-  
19 sations.

20 THE COURT: I am well aware of that.

21 A What is the question?

22 THE COURT: The last question, I say, was  
23 answered by the record. There is no dispute that the 25,000  
24 figure paid for commissions was earned.

25 Q Dr. Stern, did you include the word "retainer"

2 in the contract with IBM? Was it in the contract?

3 THE COURT: Exhibit I?

4 MR. SIMON: The September 22 contract. I believe  
5 it's L.

6 THE COURT: Would you point it out.

7 Where does it occur?

8 MR. HELLERSTEIN: Exhibit I, Article II, para-  
9 graph B is the paragraph on retainers.

10 THE COURT: The question is, Dr. Stern, Article  
11 II, paragraph B, the second line, you use the word retainers.  
12 Was that word included at your request, if you remember?

13 THE WITNESS: To the best of my recollection,  
14 the IBM attorney and I discussed this and the resulting  
15 wording was his. We discussed retainers. We discussed the  
16 fact that they would want these current income payments to  
17 be ~~advances~~ against commissions. The best I can say is as a  
18 result of a joint effort.

19 Q Dr. Stern, is there any other place in any of  
20 these documents where the word retainer appears?

21 MR. HELLERSTEIN: I object to that question.

22 THE COURT: Sustained. It's either in there or  
23 it isn't, Mr. Simon.

24 Q Dr. Stern, let me give you a preface and I will  
25 ask you a question and I hope it's not unfair. If it is I am

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2 sure counsel will object.

3                   You had a deal, and the jury so found, that said  
4 that retainers passed to you free of expenses. On  
5 September 8 you talked to an IBM man and he said "We don't  
6 like to give retainers." You, thereupon, were delegated or  
7 took upon yourself the task of negotiating the contract  
8 carrying the draft back and forth and the word retainer  
9 appears.

10                  Searching your memory, was not the word retainer  
11 placed in the contract at your request so that you could get  
12 some money free of the expense burden?

13                  A         The word retainer is in the standard form of the  
14 Satra consulting agreement and I asked them to adhere to as  
15 much of that as they would be able to. The resulting wording  
16 was a result of our joint discussion. I cannot say I was  
17 fully responsible for any single word in the document.

18                  Q         Just between us, Dr. Stern, did you know when  
19 that word appeared that you were entitled to expense-free  
20 money?

21                  MR. HELLERSTEIN: Objection, your Honor. I see  
22 no relevance whatever in this line of testimony. The witness  
23 is being badgered by repeated questions on the same point.

24                  THE COURT: I will sustain the objection. Not  
25 on the grounds of badgering, but it is sustained.

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2 Q What distinguished a retainer from an advance  
3 commission?

4 MR. HELLERSTEIN: I think the witness, your  
5 Honor, should be asked questions as to discussions and not  
6 what he thinks words mean.

7 THE COURT: Did you ever have any discussions  
8 with IBM or Satra as to the differences between advance  
9 commissions and retainers?

10 THE WITNESS: Yes.

11 Q Would you state the substance of those discussions?

12 A I discussed with Satra --

13 Q With who?

14 A With Mr. Schloss, Mr. Hanno Mott and with  
15 Mr. Giffen, whether advances against commissions which I had  
16 been willing to offer, whether they would be treated as  
17 retainers.

18 The decision was --

19 Q Dr. Stern --

20 MR. HELLERSTEIN: Don't interrupt.

21 MR. SIMON: That is not my question.

22 THE COURT: The question was: What was the  
23 substance of those discussions.

24 MR. SIMON: What was the substance of the discus-  
25 sions as between a retainer and an advance commission.

2 THE WITNESS: That is exactly what I am going to  
3 say.

4 THE COURT: He told us one part of it.

5 A The decision was Mr. Schloss specifically said  
6 we consider them both to be current kind of income. We know  
7 that the commissions are often future. In fact, his very  
8 favorite words were "two families cannot earn a living on  
9 things in the future." We need current money. Whether they  
10 are retainers or advances against commission, you will get  
11 half as indicated in your agreement.

12 And I may want to remind you I had even discussed  
13 with him the meaning of the discount present value of future  
14 moneys. Why these things are in different categories.

15 Q Dr. Stern, are you telling the Court that advance  
16 commissions likewise bear no expense burden?

17 MR. HELLERSTEIN: Objection. The witness just  
18 completed repeating a conversation to the best of his  
19 recollection and Mr. Simon is asking to characterize that  
20 conversation.

21 THE COURT: Sustained.

22 MR. SIMON: Your Honor, it does seem to me that  
23 at some point in time we have got to get from the ivory  
24 tower down to the ground.

25 THE COURT: The question is how to get there,

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2        Mr. Simon. The question is whether it's for the lawyers to  
3        get there or not.

4                I must say that Dr. Stern's speculating and  
5        theorizing doesn't mean anything more to me than anybody  
6        else's speculating and theorizing. If there was something  
7        that happened that he can report to me that casts light on  
8        the situation, that does help. When he reports a conversation  
9        on the subject, that is meaningful.

10               When he says, "What I think is this," it's no  
11        more important than what Mr. Fisher thinks.

12               MR. HELLERSTEIN: I want to comment to your  
13        Honor that every piece of conversation that we have had  
14        related this afternoon is in the record and I can cite you to  
15        page and line where it's in the record.

16               The defendant's have had a full and extensive  
17        opportunity to cross-examine Dr. Stern and instead of coming  
18        into the questions that we were supposed to deal with this  
19        afternoon, they are taking this opportunity to have a rehash  
20        of the trial.

21               THE COURT: I can't believe that they are doing  
22        that with any malevolent purpose because it wouldn't get them  
23        anywhere and they know that.

24               It's a different approach towards the question  
25        that we have got, but I do agree that the questions we have

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2 here are not what people happen to think about the situation  
3 but what happened and what I have before me. Indeed, at the  
4 outset of the case, you pointed out to me that you thought  
5 that I could decide the question whether the IBM contract was  
6 continuous of the first one on the faces of the documents.  
7 I expressed some doubt about that. I might have to look at  
8 some other information.

9 On the whole, that is the approach to take towards  
10 this construction of a contract and while I agree, and I have  
11 indicated that I agree that there is room for argument as to  
12 whether paragraph C and the expense schedule may not have  
13 ambiguities in them, I don't think those ambiguities are  
14 cleared up by my hearing Dr. Stern's theory of things.

15 Q Dr. Stern, did you have a conversation with the  
16 people at Satra whereby there was discussed the fact that  
17 all advances against commissions would never be charged with  
18 expenses?

19 A Yes, sir.

20 Q Suppose, as in fact was the case, an advance  
21 against commissions was recouped by IBM out of commissions  
22 payable. Did you have any discussions with Satra that covered  
23 that circumstance?

24 A You know, you give me a hypothetical thing and  
25 let me answer with a specific. We received \$25,000 as an

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2 advance against commission. Half of that, 12,500, the check  
3 was drawn by the treasurer and handed to me by the vice  
4 president.

5 There were no objections by the attorney from  
6 Satra. I, therefore, came away assuming we all understood  
7 the same thing.

8 Q I agree.

9 At some point in time the \$50,000 was charged  
10 back by IBM against commissions then owed to Satra for sales  
11 made in concluding, was it not?

12 A Yes, sir.

13 MR. HELLERSTEIN: If you know.

14 THE WITNESS: I believe so. I shouldn't answer  
15 those things. I am sorry.

16 That is info that you fellows have in the stipu-  
17 lation.

18 THE COURT: It must be in the record.

19 MR. SIMON: It is.

20 Q Were expenses charged against that payment?

21 THE COURT: If you know.

22 MR. HELLERSTEIN: If your Honor please, this  
23 contract had been repudiated before that event took place.  
24 This is just an example of where we are going.

25 THE COURT: I sustain the objection because it

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2 seems to me clear that the witness has no knowledge of which  
3 he can answer the question.

4 MR. SIMON: Can I ask him if he has knowledge?

5 THE COURT: You can ask him that.

6 Do you have any knowledge as to whether expenses  
7 were charged against \$50,000 -- knowledge not by rumor?

8 THE WITNESS: I have no direct knowledge.

9 Q Did you ever seek reimbursement from Satra for  
10 your own personal expenses?

11 MR. HELLERSTEIN: This is irrelevant. There is  
12 no issue in this.

13 THE COURT: Overruled.

14 A You mean after the August 31 agreement?

15 Q Yes, at any time.

16 A In connection with the other, I was reimbursed  
17 according to the agreement only for my expenses going to  
18 Moscow and back and for associated detainment of IBM, or  
19 something like that, exactly in line with what is in here,  
20 that is all. I was not reimbursed for all the other expenses  
21 I had.

22 THE COURT: When you say it's in line with what  
23 is in here, what are you referring to?

24 THE WITNESS: In paragraph C it specifically  
25 says the only thing they are going to cover is foreign travel.

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2 if they approved it, and that is what they covered.

3 Q You got your money back, other than your travel  
4 from California to New York?

5 THE COURT: Apparently yes.

6 A Yes.

18 7 Q Did you ever discuss the fact with Mr. Oztemel  
8 that at any time you were coming out better in the deal than  
9 Satra?10 MR. HELLERSTEIN: Objection to the question,  
11 your Honor. I don't know why it's relevant.

12 THE COURT: Overruled.

13 A Did I ever discuss with him that any time I was  
14 coming out better than Satra?15 THE COURT: That doesn't assume that I accepted  
16 the premise to the question, but did you have such a discus-  
17 sion?18 THE WITNESS: No, no way. In fact, it was the  
19 other way but let's not argue about it.20 MR. SIMON: Your Honor, what I would like to do  
21 is to ask Dr. Stern some questions but it would strictly be  
22 a question of his opinion as to how the expense schedule  
23 works. I would like to hand him some things and see how he  
24 can answer it. I think that is appropriate.

25 MR. HELLERSTEIN: If I asked those questions in

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2 Ft. Worth I would be run back to New York. I think it's  
3 ridiculous.

4 THE COURT: I am not sure about your premise.

5 MR. HILL: Your Honor, Mr. Simon is a guest here  
6 and that was uncalled for.

7 MR. SIMON: My feelings are not hurt.

8 THE COURT: Gentlemen, please.

9 I'm afraid I will have to rule that line of  
10 questioning out of order. You are perfectly free to give me  
11 your own views, if you want to put it, of the unreasonableness  
12 of various hostile methods of operation.

13 Q Dr. Stern, did you ever discuss with anyone at  
14 Satra the idea that expenses were to be recouped on a 40  
15 percent basis, strictly 40 percent of gross revenues to be  
16 deducted and repaid by Satra for expenses?

17 A That is something completely new to me. It  
18 happens to coincide with the first increment but nowheres  
19 else.

20 THE COURT: Did you ever talk to anybody on that  
21 subject? That is the question.

22 THE WITNESS: There was once an offer by  
23 Mr. Oztemel to have a 60-40 share. That is the only thing  
24 I can recall.

25 THE COURT: 60-40 share of what?

2 THE WITNESS: Total revenues.

3 THE COURT: The question being asked is whether  
4 you ever had a conversation with anybody from Satra that the  
5 way expenses should be handled would be for 40 percent of the  
6 revenues to be charged as expenses, is that right? Is that  
7 your question?

8 MR. SIMON: Yes, sir.

9 THE WITNESS: You mean all of the revenues and  
10 all the expenses? The answer would be no.

11 Q Since there never were revenues in excess of  
12 250,000 in any year, let's confine --

13 A We are speaking about before there were any  
14 revenues at all. I am all mixed up. You are speaking before  
15 there were any revenues at all.

16 THE COURT: Yes.

17 Q Did you have such a discussion?

18 THE COURT: Before there were any revenues, you  
19 sat down and talked about varoious expenses. One of the ways  
20 you discussed the possibility that when revenues did come in  
21 they would be charged, 40 percent charged in lieu of expenses.  
22 Did you ever have such a discussion?

23 THE WITNESS: Our discussion was at the meeting  
24 at the first increment --

25 Q With whom?

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2 A Hanno Mott and Bill Hermann, that that number was  
3 easy to calculate. During the first increment the slope is  
4 40 percent but then it varies from there.

5 THE COURT: We can see what it does. We are  
6 asking whether you had a conversation that it wouldn't vary.  
7 It would always be 40 percent.

8 THE WITNESS: No.

9 Q The question is, did you have the discussion with  
10 Hanno Mott and Bill Hermann of applying 40 percent at least  
11 to 250,000 without getting involved with the other statements?  
12 Your answer is yes?

13 A My answer is that is the interpretation of the  
14 first increments. We did discuss that interpretation of that  
15 initial increment.

16 Q Did you agree with them that 40 percent of all of  
17 the revenues at least up to 250,000 in any year would be  
18 applied to expenses?

19 A In an incremental way. I am not sure I understand  
20 the language you are using.

21 Q Did you agree with Hanno Mott and Bill Hermann  
22 that 40 percent of at least the first 250,000 that came in  
23 in any year would go to Satra as an expense allowance?

24 A As applicable to the schedule leaving out the  
25 handwritten part, yes.

2 Q. And that was your agreement, leaving out the  
3 retainer? That is what you are telling the Court the deal  
4 was?

5 MR. HELLERSTEIN: Can't Mr. Simon get an under-  
6 standing of where he could ask him or where he can't? We go  
7 back to the same point and he keeps on insisting asking  
8 objectionable questions.

9 Q. I will rephrase the question.

10 Did that agreement change?

11 A. Did what agreement?

12 Q. The agreement you made or the discussion that you  
13 had with Mr. Hanno Mott and Mr. William Hermann that out of  
14 the first \$250,000 in any year, 40 percent would be applied  
15 as expenses?

16 MR. HELLERSTEIN: Dr. Stern was asked this on  
17 direct and cross. Mr. Mott was asked this question.

18 Mr. Oztemel was asked this question. Why does this have to  
19 be an issue here?

20 THE COURT: Now that we are getting into the guts  
21 of this subject matter, while I don't recall all of the  
22 material that was before the jury, it seems to me there was  
23 a great deal of this and I continue to be baffled. This is  
24 absolutely not what I expected this hearing to concern itself  
25 with.

2 I also feel frustrated about the situation. What  
3 are you trying to bring out today that wasn't brought out in  
4 the trial?

5 MR. SIMON: I believe that the jury determined  
6 the parties tried to make a deal and I think the parties had  
7 the basic rudiments of an agreement

8 THE COURT: But the jury certainly must be con-  
9 strued to have decided that the parties made a deal, not  
10 tried to make a deal.

11 MR. SIMON: I agree. But I don't know and  
12 couldn't state to the Court how to apply this expense factor.  
13 It seems to me that the only evidence, unless we go on pure  
14 conjecture, of how to apply the expense factor, is to ask  
15 the parties what they agreed to.

16 MR. HELLERSTEIN: At Tab 1 I have collected all  
17 the testimony at the trial and it's rather thick on this  
18 precise point.

19 THE COURT: There are two points. Believe me,  
20 Mr. Simon, and I feel particularly sensitive in view of the  
21 fact that you are from another part of the country and I  
22 don't want to give the impression that I am being rude or  
23 not giving you the opportunity to prove what you are fairly  
24 entitled to, but putting that aside, there are two points I  
25 would like to make.

2 Without being able to recall in detail what the  
3 testimony was at the trial in this issue, I certainly do  
4 recall there was plenty of testimony about it. Nobody was  
5 really foreclosed from bringing out anything he wanted to  
6 bring out. I am not going to apply arbitrary rules of res  
7 judicata or waiver or estoppel or anything else. Certainly  
8 we don't want to go back over stuff that could be there or  
9 should have been there.

10 The second is, I don't find it's helping me very  
11 much to decide what this is all about except to the extent  
12 that there were actual discussions. Yes, when he said they  
13 had a discussion in interpreting the first 100,000 or the  
14 250,000, 40 percent of that, that means something. I don't  
15 know how much, but it means it's a little tiny little glitter  
16 that may be of value some time.

17 MR. SIMON: I won't belabor the point. My own  
18 feeling about this, and I certainly bow to your recollection,  
19 which I am sure is better than mine, but my own feeling about  
20 this is that I think the Court can do this one of two ways.

21 The Court can just sit down and say this is a  
22 contract signed and sealed by the jury and I'm going to figure  
23 out what it means, or the Court can say there is an awful lot  
24 of confusion about how this expense schedule was going to be  
25 applied and we can hear the evidence of the only people whose

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2 testimony would mean anything.

3 THE COURT: Mr. Simon, I don't think it's reason-  
4 able to believe that I have closed the door to the latter  
5 approach. The question is, even if I leave it open, what  
6 do we do? I have said I am not prepared to say there is  
7 no ambiguity. I am not prepared to say that I can decide  
8 this just on the face of it although I think maybe I can.  
9 I would have to consider what the jury verdict -- what the  
10 impact of the jury verdict is on this. But I have also said  
11 to the extent I am willing to take testimony about what the  
12 contract may mean, it must relate to conversations or trans-  
13 actions between the parties and not speculation and theori-  
14 zation. I would be no more interested as to what Mr. Oztemel  
15 would say. You and Mr. Hellerstein can give me theory.

16 MR. HELLERSTEIN: Even apart from Mr. Simons'  
17 point about what the jury decided or didn't decide, we have  
18 a record. It's still the record for this hearing. There is  
19 no reason I see to rehash that record.

20 THE COURT: There is no reason to rehash but if I  
21 read it yesterday I would be in a position to tell you whether  
22 I think we have covered the precise point in question and  
23 since I haven't, I can't remember whether the precise point  
24 has been covered. I will allow Mr. Simon to ask further  
25 questions about conversations between parties and I am

2 sticking to that in that order.

3 MR. SIMON: Before we got derailed, and I think  
4 Mr. Hellerstein's comments may have been appropriate in some  
5 of the earlier sessions, this line was: did you discuss a  
6 40 percent expense factor with Mr. Mott and Mr. Hermann and  
7 the answer was yes.

8 My next question was: Did you have any agreement  
9 before the agreement was signed?

10 THE COURT: The answer was that was the inter-  
11 pretation of \$100,000 to 250,000, is that right?

12 THE WITNESS: Yes.

13 Q Did you have any further discussions before the  
14 agreement was signed?

15 THE COURT: Did you have any discussions of using  
16 the 40 percent factor in some way with respect to expenses?

17 THE WITNESS: Not that I can recall.

18 Q Why did Mrs. Hauser include that when she submitted  
19 the thing to Satra?

20 THE COURT: You can't ask him if she did.

21 Q Did you ask her to put the 40 percent factor in  
22 when you submitted the contract to sign? I believe that is  
23 XX.

24 A I gave her my interpretation of the understanding  
25 we had reached relative to the operation of the expense.

2 Q Dr. Stern, I noticed in looking at Plaintiff's  
3 Exhibit C -- and I will tell your Honor I am almost through--  
4 that the retainer portion of it, that is the expense-free  
5 taking of the retainer, did not apply under alternative two.  
6 Did you have a specific discussion with Mr. Oztemel  
7 limiting the expense-free retainer to alternative one as  
8 opposed to alternative two?

9 A Yes.

10 Q What was the nature of that discussion?

11 A He was urging me to take alternative one -- by  
12 the way, I went over this here.

13 THE COURT: Go ahead, do it again.

14 A He was uring me to take alternative one. Even  
15 though he had whittled me down and down and down on the  
16 salary, and he still didn't want to advance any salary at all.  
17 He didn't want to take any risk at all. He was urging me to  
18 take the 50. I then said it becomes very, very confused.  
19 Even though if we do get IBM, which I don't know, and I don't  
20 know how long it's liable to take and as to the risk that I  
21 have, it now gets very complicated by the application of this  
22 expense schedule and I cannot have any gut feel for what kind  
23 of current income I might have.

24 He then immediately volunteered. He said I am  
25 right, that expense schedule really is applicable to the

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2 effort he has to exert in consummating the sale to financing  
3 the barter and as an inducement from me to accept the 50-50  
4 sharing he offered that there will be no application of the  
5 expense schedule to the current income.

6 I said, "Good, you say that, write it down," and  
7 I must say I said, "Sign your god-damn name."

8 Q Was there any discussion at all as to the maximum  
9 amount of retainers that you might get or would seek from IBM  
10 at this time?

11 A When and with whom?

12 Q With Mr. Oztemel at the time he limited the  
13 retainer portion alternative to I?

14 A No, sir.

15 MR. SIMON: I suppose it's appropriate to ask  
16 Dr. Stern some questions, for the sake of developing the  
17 record, of what he has done in the nature of mitigation, for  
18 whatever significance it may have.

19 MR. HELLERSTEIN: Can we find out from Dr. Stern  
20 if he needs a recess?

21 MR. SIMON: I can use one myself.

22 THE COURT: All right.

23 (Recess.)

24 THE COURT: All right, Mr. Simon.

25 Q Dr. Stern, I am going to take advantage of the

2 lawyer's prerogative to change his mind and ask you a couple  
3 of more questions about some of the numbers before we get to  
4 the issue of damages.

5 I have given you, which you will find on your  
6 left, Defendant's Exhibit 1 introduced at this hearing, or  
7 at least identified.

8 My question to you is, leaving aside for the  
9 moment the characterizations as to whether they had the  
10 adverse affect on anyone's position, are these the figures  
11 as you understand them which represent and evidence total  
12 receipts from IBM?

13 THE COURT: I don't see what the witness' under-  
14 standing of that is. I understand there is a stipulation  
15 between the parties as to the receipts.

16 MR. SIMON: I think there is a stipulation that  
17 these are in fact the numbers --

18 THE COURT: I don't know whether those are the ones  
19 that are, in fact, the numbers, but if you want to check the  
20 stipulation against the exhibit, that is perfectly all right.

21 MR. SIMON: Does anybody argue about it? I want  
22 to use it to talk about it. I have no probative effect  
23 involved. I might say, your Honor, if in fact the numbers  
24 as evidenced here vary from the stipulation, we will all be  
25 guided by the stipulation.

2 THE COURT: All right.

3 What is the question you have?

4 Q I call your attention to the fact that there are  
5 five different categories of receipts from IBM as they run  
6 across the top of the page and I again tell you these are  
7 strictly my language.

8 ' " original retainer commissions on goods  
9 delivered, monthly payments per paragraph 2 of the contract  
10 dated December '73, advance commissions and reimbursements.

11 Do you see those five categories?

12 A Yes, I can see them.

13 Q My first question, Dr. Stern, based on your dis-  
14 cussions with the Satra people and the contract which you  
15 made, is there any extension factor as applied to the \$50,000  
16 that came in the fall of 1971?

17 A I really don't understand what you are talking  
18 about.

19 MR. HELLERSTEIN: He is asking the witness to  
20 draw legal conclusions.

21 THE COURT: I don't know whether you are asking  
22 him that there should be something charged against him, in  
23 which case I will sustain the objection, or whether you are  
24 asking whether there was actually something charged against  
25 it, in which case it's a question of fact and he either knows

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2 or he doesn't.

3 MR. SIMON: If the Court please, I suppose it  
4 might be useful to state for the record our position here.  
5 As I recall the testimony on direct of Dr. Stern, indeed the  
6 background --

7 THE COURT: Today?

8 MR. SIMON: No, sir, the basic testimony. It is  
9 in large measure what his understanding of the contract was.

10 I understand -- before Mr. Hellerstein stands  
11 up -- that Mr. Hellerstein thinks that Dr. Stern's under-  
12 standing of the contract, the deal that he made, is immaterial.  
13 I understand he has objected to this entire line. I further  
14 understand that it is your Honor's position that such an  
15 objection should be sustained for two reasons. One, because  
16 it may not be material to know what his understand was, and  
17 two, because the matter may be foreclosed by either the  
18 jury's verdict or the Court's desire to construe the instru-  
19 ment from the four corners.

20 With that in mind, your Honor, we would state for  
21 the record that we believe we are entitled to ask Dr. Stern  
22 what his understanding is as to what items of revenue the  
23 expense schedule was to be charged to and if the Court sus-  
24 tains the objection, which the Court indicated he will, if  
25 it is appropriate under your practice, I would like to do it

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2 under a bill of exception or offer of proof.

3 I would like to offer for the record what  
4 Dr. Stern's interpretation of his deal is.5 THE COURT: That is perfectly fair although I  
6 think it's clear on the record that you have wished to bring  
7 that out in the past. To make it perfectly clear, I under-  
8 stand you are offering to prove what Dr. Stern's interpretation  
9 of the deal is.10 I can only say that I don't believe that would  
11 be proper at this time and when I say at this time, that is  
12 a question of law, it seems to me, whether that is admissible  
13 or not admissible.14 If you can persuade me, if you want to take a  
15 little time to go to the library and persuade me that where  
16 there is an ambiguity the witness' unilateral interpretation,  
17 as distinct from his reporting of events, related to the  
18 formation of the contract is admissible, I don't mean to do  
19 anything but what I understand the law to be.20 MR. SIMON: I wouldn't argue the point with you  
21 but I think you put it very clearly. If we find or if the  
22 Court finds that there is, in fact, an ambiguity, then it  
23 would be our position very clearly that the party's own  
24 understanding of what was involved is admissible evidence.

25 If the Court finds alternatively that there is no

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2 ambiguity or that whatever ambiguity there is has been  
3 necessarily resolved by the verdict of the jury, then I will  
4 agree with your Honor that the testimony is not admissible.  
5 We make it as an offer of proof.

6 THE COURT: I don't want to call you back again  
7 on the basis that I may have too narrowly construed your  
8 right to put in evidence. As long as there is no jury I  
9 will let you do it.

10 MR. SIMON: We understand it's being offered as  
11 an offer of proof and that the objection to it has been  
12 sustained.

13 Q Dr. Stern, you will note that in the fall of  
14 1971 there was paid \$50,000. That is a fact, is it not?

15 THE COURT: It's stipulated, yes.

16 A I have heard it's a fact question was there to  
17 be any expense charged against that \$50,000?

18 THE COURT: You understand that there was, is  
19 that right?

20 MR. SIMON: All of my questions suppose that I  
21 am asking for the witness' understanding.

22 THE COURT: Dr. Stern has been precise. So we  
23 have no mistake about it, I want him to understand what you  
24 are asking.

25 As you understand the contract, were there any

2 expenses to be charged against that \$50,000?

3 MR. HELLERSTEIN: I take it that is payments with  
4 respect to Satra by Mr. Stern and not the relationship of  
5 IBM and Satra?

6 MR. SIMON: I agree.

7 A Mostly the view that exists in my mind now comes  
8 from a document which I haven't seen and from headings which  
9 makes no sense to me.

10 May I see the original stipulation which I have  
11 seen and I do understand? I will be able to answer. That  
12 is easier for me.

13 MR. HELLERSTEIN: I show the witness Exhibit DDDD.

14 Q Let's look, if we will, at Arabic 2 of Exhibit  
15 quadruple D and if you will accept my statement, the same  
16 numbers appear on the exhibit marked Defendant's Exhibit No.  
17 1, the first page.

18 I am now looking at the payments dated October 7,  
19 1971 and December 20, 1971. There is a typographical error  
20 on Defendant's Exhibit No. 1 but we are talking about two,  
21 \$250,000 payment, I think is the only two, \$250,000 payments.

22 A Yes, sir.

23 Q Under the deal, as you understand it, was any  
24 expense factor to be applied to those sums?

25 A No, sir.

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2 Q Under the category, commissions on goods  
3 delivered, you will notice that in the second year and the  
4 third year there are entries; do you see that?

5 A Yes.

6 Q That is Defendant's Exhibit 1, the schedule?

7 A I am looking at Schedule D.

8 Q From the words nature of payment, there is the  
9 word commission and two ditto marks underneath it.

10 A That is correct.

11 Q With a rough total among those numbers of about  
12 21 or \$22,000.

13 A Yes, sir.

14 Q Dr. Stern, my question is: as you understood the  
15 deal, was there an expense factor to be applied to those  
16 commissions?

17 A Yes, sir.

18 Q What was the amount of the expense factor?

19 A Assuming they were all in one year and they  
20 totalled under 250,000, which they do, then 40 percent of the  
21 \$22,716 is to be taken off for expenses.

22 Q I take it your answer is no different if it is  
23 a fact that 19,993.42 was paid in the second year and  
24 2,723.34 in the third year?

25 A That is correct because they are each under --

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2 THE COURT: Each under what?

3 THE WITNESS: Each under the \$250,000. They are  
4 each on the 40 percent slope. That is right.5 THE COURT: May I see that schedule for a moment  
6 so I am sure I am making notes with regard to the same  
7 figures that you gentlemen are talking about.8 I understand you are talking about commissions  
9 received March, April and November 1973, is that right, in  
10 the amounts of 7,000, 12,000 and 2,000 plus?

11 MR. SIMON: That is correct.

12 Q Let me ask you, Dr. Stern, let me pose to you a  
13 hypothetical question. Let us assume, Dr. Stern, that in  
14 the year 1973 the total commissions payable to Satra by IBM  
15 for goods actually delivered were, in fact, \$69,993.42 and  
16 that IBM deducted the sum of \$50,000 before writing and  
17 sending its check. Did I make myself clear?18 THE COURT: Do you have to pick such an odd amount?  
19 69,000 is good enough.20 MR. SIMON: 69,000 is simply 50,000 plus the  
21 amount of the second year as shown in the schedule. In the  
22 schedule the amount shown is 19,993.42 at the second year.  
23 The hypothetical assumes that the amount of the commissions  
24 owed and payable by IBM to Satra was 69,993.42. Are you  
25 with me?

2 THE WITNESS: No, I am sorry.

3 THE COURT: Why don't you use the blackboard.

4 Q With due apologies for the penmanship, here is  
5 the hypothetical. Base the assumption, if you will,  
6 Dr. Stern, that in the second year of the contract the actual  
7 sum which IBM was contractually obligated to pay Satra was  
8 \$69,993.42.

9 A Yes, sir.

10 Q Goods sold and the commission applied at either  
11 three and a half or seven percent as appropriate, all right?

12 A Yes.

13 Q Make the further assumption hypothetically that  
14 IBM deducted from the 69,993.42 the sum of \$50,000 and, in  
15 fact, remitted Satra 19,993.42. Can you make that  
16 assumption?

17 A Yes, sir.

18 THE COURT: What would IBM have deducted the  
19 50,000 for?

20 MR. SIMON: They took back the retainers, because  
21 they weren't retainers, they were advances against commissions.  
22 Are you with me on that assumption?

23 THE WITNESS: Yes, sir.

24 Q Assuming those facts as hypothetically posed to  
25 you to be true, what factor at the time of the \$50,000

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2 deduction, and as you understood the deal, entitled you to  
3 an expense credit of \$20,000 or 40 percent of the amount of  
4 commissions actually earned?

5 A No, sir. They are entitled not to have expenses  
6 on the advance. They are entitled to have expenses on the  
7 commissions.

8 So they would be entitled to take off 40 percent  
9 of 19,993 and some odd cents. I can tell you why, if you are  
10 interested.

11 Q You answered the question.

12 Let's turn to the third subsection under  
13 Defendant's Exhibit No. 1, which is marked monthly payment  
14 as per paragraph two of the contract dated December 1973.  
15 You will find some numbers there in the line marked third  
16 year.

17 THE COURT: Which exhibit now is this?

18 MR. SIMON: We are working from two exhibits.

19 I am looking at the third year under Defendant's Exhibit No.  
20 1, which is the schedule. Those numbers correspond to the  
21 last four entries all dated 12/3/73 of page 3 of the exhibit  
22 marked Plaintiff's quadruple D.

23 THE COURT: All right.

24 Q Have you got that in mind, Dr. Stern?

25 A Yes, sir.

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2 Q Is Satra entitled to expense reimbursement on the  
3 sum of \$116,669 or any portion thereof as you understand the  
4 deal?

5 A Where do you get 116,000?

6 MR. HELLERSTEIN: The \$116,000 sum relates to the  
7 sum of the seven payments of \$16,667 as shown on page 3 of  
8 Exhibit quadruple D.

9 MR. SIMON: Let me make that clear.

10 THE COURT: Please do make it clear.

11 MR. SIMON: I will do my best, your Honor. On  
12 Exhibit quadruple D, the sum of \$116,000 is the total of the  
13 figures 66,668 marked monthly fee and the other three figures  
14 each in the sum of \$16,667 marked monthly fee.

15 THE WITNESS: I understand.

16 Q Are we together on that?

17 A Yes.

18 Q Is Satra entitled to charge expenses against that  
19 sum of \$116,669 as you understand the contract?

20 A No.

21 Q Let us look at advance commissions which commence  
22 on 12/22/73 on the third page, marked third year of  
23 Defendant's Exhibit No. 1 and which correspond number for  
24 number to the figures marked monthly advance at page 3 of  
25 Exhibit quadruple D. Are we together?

2 A Yes.

3 MR. HELLERSTEIN: I object to the form of the  
4 question.5 THE COURT: He just said, "Let's look at some-  
6 thing."7 MR. HELLERSTEIN: The preface of the advance  
8 commissions is Mr. Simon's language.9 THE COURT: He is describing how it's described  
10 in Exhibit 1 of today and how it's described on quadruple D  
11 before.12 Q My question: As you understand your transaction,  
13 is Satra entitled to any expense reimbursement from the figure  
14 marked advance commissions, or, alternatively, monthly  
15 advance?16 A From the monthly advance they are not entitled  
17 to expense deductions.18 THE COURT: As I understand you, you are saying  
19 they are not entitled to expense deduction for any item you  
20 have been questioned about in the last page of Exhibit  
21 quadruple D?

22 THE WITNESS: I will be happy to explain why.

23 Q Dr. Stern, it's your testimony for the purpose of  
24 this bill that per your understanding Satra is entitled to 40  
25 percent of the sum of \$21,000 and odd cents as an expense

1 jqd

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2 reimbursement and that you get one-half of everything else,  
3 is that your position?

4 A I don't know what you mean by everything else.

5 Q One-half of all of the other revenues as they  
6 appear on the schedule?

7 A I am sorry. You have lost me.

8 Q Let me go back. We are picking figures out of  
9 the air and I can understand that. I am asking you now for  
10 your understanding.

11 You have testified, as I understand the discussion,  
12 that based on the deal the way you understand it, the only  
13 items which Satra is entitled to expense reimbursement on is  
14 the item marked commission on goods delivered as it appears  
15 on Defendant's Exhibit No. 1 or the item marked as an  
16 identical item commission as it appears on page 2 of the  
17 Exhibit quadruple D and that is the only item on which an  
18 expense factor is applied?

19 A Yes, relative to these particular numbers.

20 Q And that is true even though Satra, in fact,  
21 based on sales actually completed, had earned commissions of  
22 \$71,000 or so?

23 MR. HELLERSTEIN: I object to the form of the  
24 question. There are many possibilities.

25 THE COURT: I don't think it makes any difference

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2 whether it's true or not. You have gotten Dr. Stern to  
3 express his position and you can argue from that position.

4 Q Dr. Stern, you were present during the testimony  
5 of Mr. Witham, were you not?

6 A Yes.

7 Q Is there anything to which he testified that you  
8 have personal knowledge of which is untrue?

9 MR. HELLERSTEIN: I object to the form of the  
10 question.

11 THE COURT: Do you have any personal knowledge  
12 of the subject of his testimony?

13 THE WITNESS: Perhaps minor, at the earlier  
14 stages. But there is nothing that I am familiar with that  
15 he said that I can dispute. He did say a lot of things I had  
16 not heard before.

17 Q Let me be specific.

18 THE COURT: Please do.

19 Q Mr. Witham testified, as I recall, that the  
20 figure monthly advance as paid by IBM in the sum total,  
21 according to these schedules of \$65,450, was an advance to  
22 Satra subject to their repayment to IBM in the event that the  
23 deal doesn't go through with the export licenses in issue,  
24 is that correct?

25 THE COURT: Are you talking about the 1973

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2 contract?

3 MR. SIMON: Yes, sir.

4 THE COURT: I don't see how Dr. Stern can comment  
5 on that.

6 Do you know anything about that?

7 THE WITNESS: I was not involved. I wasn't asked.

8 THE COURT: You don't know?

9 THE WITNESS: I don't know. I heard here but I  
10 don't know anything else.11 MR. SIMON: So I may understand, and your Honor,  
12 I am asking this question not for the purpose of the bill,  
13 but sort of a voir dire.14 Is it a fact that you did not participate in any  
15 way in the negotiations which led up to the IBM contract of  
16 December 1973?

17 THE WITNESS: That is correct.

18 THE COURT: Are you ready to go on now?

19 MR. SIMON: Yes, sir.

20 THE COURT: Go ahead.

21 MR. SIMON: If the Court please, I think we will  
22 dispense with the offer of proof and make a normal offer of  
23 the testimony as it has been adduced in the offer of proof.

24 THE COURT: I don't understand, Mr. Simon.

25 MR. SIMON: For the record, your Honor.

2 THE COURT: My ruling is the same. I reserve  
3 decision and I will have to determine number one, whether I  
4 consider that after the jury's verdict there is any ambiguity  
5 in the contract. I will then have to determine whether the  
6 rule is whether there is any ambiguity in the contract the  
7 testimony as to the parties' understanding or interpretation  
8 of the contract is admissible, and rule accordingly.

9 Q Dr. Stern, from the date of your termination of  
10 the agreement with Satra, and I am not trying to characterize  
11 the termination, how have you made your living?

12 A A variety of ways. I am not hedging.

13 Fundamentally I am a director of a few moderate sized firms  
14 from which -- and I hold some ownership in them, from which  
15 I gain some fees. I gain some stock opportunities. More  
16 recently I have gone into consulting for companies that I am  
17 not a director of.

18 Q Let me ask you to characterize, if you can, if  
19 there is any employment which you have undertaken since the  
20 fall of 1971 which has occupied your time on a daily basis?

21 A No.

22 Q Are you presently drawing a salary for daily  
23 services from any source?

24 A No.

25 Q Are you presently engaged in consultation --

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2 A In order not to confuse you, from a legal point  
3 of view I have a corporation under my own name and I take a  
4 salary from it. That is just -- the answer that you are  
5 looking for is no.

6 Q Let me be sure we understand each other.

7 We are trying to do this in a short fashion.

8 THE COURT: If you spent full time for your own  
9 corporation and you got paid \$100,000 a year, that might  
10 mean something. If you are telling us that you have a closed  
11 corporation which pays you a modest salary and with regard  
12 to which you spend a modest amount of your time, that is  
13 something else. Is that what you are saying?

14 THE WITNESS: Essentially what I am saying is  
15 that I have no arrangements which obligate me to spend full  
16 time on anything.

17 Q Have you had any arrangements which have obligated  
18 you to spend as much as 50 percent of your daily time since  
19 1971?

20 A No, sir.

21 Q Do you do any type of gainful labor that involves  
22 consultation with parties interested in doing business in the  
23 Soviet Union?

24 A Yes.

25 Q What do you do in that regard? Let me ask you

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2 without having to rephrase it each time.

3 I am interested from the period of 1971 to date.

4 A I have advised some firms as to what I consider  
5 to be a potential market area for them in the Soviets and  
6 there are two particular firms I have gone over to Moscow  
7 with.

8 Q Which firms are those?

9 A One was Raytheon and the one is the Foxboro  
10 Company.11 Q Approximately what has been your compensation in  
12 dollars since November of 1971 for the service of consulting  
13 with customers or clients on the potentialities of the Soviet  
14 market?15 MR. HELLERSTEIN: I note my objection to this  
16 line, your Honor.

17 THE COURT: Overruled.

18 A For Raytheon we had a honeymoon. I went there  
19 with them for a week. I got \$15,000. For the Foxboro  
20 Company I have an agreement whereby I get both a retainer and  
21 commission.22 Q My question is: what has been your compensation  
23 in dollars from Foxboro Company since November of 1971?  
24 That is, for the services relating to the Soviet Union.

25 A It's also been about \$15,000.

2 Q Do you have any contractual rights with Foxboro  
3 Company for future commissions based on work which you have  
4 already done?

5 A Yes.

6 Q How would you evaluate the present work in  
7 dollars of those rights?

8 A I really cannot evaluate it.

9 Q What could you receive if it all went to the  
10 best?

11 A I cannot evaluate that.

12 Q You can tell us, I think, what you might receive  
13 if everything went well and then you can define what you're  
14 apt to receive if it all goes to the worst.

15 A I really cannot answer that. I cannot evaluate.  
16 That would be very hypothetical and I don't know.

17 Q Could you receive as much as \$25,000 based on  
18 work which you have already done if the dominoes fell in  
19 place from now on?

20 A Yes, sir.

21 Q Could you receive as much as \$50,000 for work  
22 which you have already done if everything went to the best  
23 from now on?

24 MR. HELLERSTEIN: Wouldn't it be easier to ask  
25 him what he has?

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2 THE COURT: What he has?

3 MR. HELLERSTEIN: What he got in terms of his  
4 deal.

5 THE COURT: What the arrangement is?

6 MR. HELLERSTEIN: Yes.

7 THE COURT: What is the arrangement?

8 THE WITNESS: The arrangement with Foxboro is --

9 MR. SIMON: I don't mean to interrupt, but this  
10 is cross-examination and for reasons of my own I really don't  
11 want a discussion of a third party contract as to which I  
12 have no knowledge and haven't seen. I would really rather  
13 have the witness' evaluation.14 THE COURT: I am supposed to be bound by reality  
15 and not evaluations. I would like to hear what Dr. Stern  
16 has to say. You don't want to invade privacy but if he is  
17 willing to give that information it would be more meaningful  
18 to me and we can put our heads together and see what we think  
19 it's worth.

20 What is the arrangement?

21 THE WITNESS: The arrangement with Foxboro is  
22 \$25,000 a year as a retainer for two years and three months.

23 Q Per year or total?

24 A Per year.

25 Q When did it begin?

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2            A        October 1, 1973. And I am to share with an  
3        associate five percent commissions on sales during this three  
4        years, share equally.

5            THE COURT: Two and a half percent to you?

6            THE WITNESS: That is right.

7            Q        Was it by applying the figure two and a half  
8        percent to what you think the revenues could be that you got  
9        the figure?

10          A        That is what goes into, Marvin Stern Associates.  
11        Against that I have expenses. I have an associate in Moscow  
12        that I have to pay and things like that. So I myself get  
13        actually somewhat less than that.

14          Q        You found, have you not, that it costs money to  
15        do business in Moscow?

16          A        Do you really want an answer?

17          THE COURT: No, he doesn't really want an answer,  
18        but don't be so serious.

19          Q        Let me see if I got the summary because I wasn't  
20        writing while you were talking. You got 15 from first A,  
21        and you have no contingencies. You have gotten 15 from first  
22        B and you have contingencies which you think might be worth  
23        \$25,000?

24          THE COURT: At one time he said it might add up  
25        to more than \$25,000.

2 THE WITNESS: I cannot evaluate that. It's  
3 completely out of my hands.

4 Q Is it fair to say, Dr. Stern, that prior to  
5 August 31, 1971, you had earned no money as a consultant on  
6 affairs involving the Soviet Union?

7 A That is right.

8 Q Could you furnish for us now in very general  
9 terms, and I would certainly understand if you would prefer  
10 to furnish it later in writing, your personal and your  
11 corporate income, the corporate income being only the income  
12 of your solely owned corporation if it is for the years  
13 beginning -- let's just say beginning January 1, 1972, for  
14 1972 and 1973.

15 A I am willing if my counsel wants me to, sure.

16 THE COURT: This may or may not be relevant but  
17 we might as well get all the information.

18 THE WITNESS: I have nothing to hide.

19 I would like to see reciprocity.

20 MR. HELLERSTEIN: Can Dr. Stern get off the  
21 witness stand and pick this out?

22 THE COURT: Yes.

23 Q Would you read the figures into the record  
24 identifying them as being personal or corporate and for what  
25 years.

1 jqd

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2 Again, let me say this: I have walked this  
3 ground before and I understand that where you have a solely  
4 owned corporation you have corporate income and conceivably  
5 a personal income from the same corporation.

6 A I will give you just what you are asking for.  
7 I've got nothing to hide.

8 Let's start with the year 1972. My corporate  
9 income in 1972 was \$26,684.

10 Q Is that gross income or is that taxable income?

11 A Gross. I can show you where it came from, if  
12 you are interested.

13 Q All I was concerned about is that it wasn't  
14 reduced by overhanging losses from previous years.

15 A No, that is the total money that came in,  
16 26,684.

17 THE COURT: Personal income that year? I would  
18 like to know if you know how much of your personal income  
19 comes from your corporation.

20 THE WITNESS: From the corporation I took  
21 \$16,250. Then there is other income which you aren't  
22 interested in.

23 THE COURT: I wanted to know what your personal  
24 income was and how much of it came from the corporation so  
25 I don't duplicate.

2 THE WITNESS: That is rather complicated.

3 THE COURT: Do you have your tax returns?

4 THE WITNESS: I have them here. You are asking  
5 for --

6 THE COURT: On the front page of the tax return  
7 it usually says what your income is.

8 THE WITNESS: Income other than wages, dividends--

9 THE COURT: There is usually a gross figure  
10 there.

11 Do you have any objection if I look at it?

12 THE WITNESS: No.

13 THE COURT: It's this figure here. Adjusted  
14 gross income is \$22,282 and, as I understand it, of that  
15 adjusted gross income 16,230 or whatever it is, came from  
16 your corporation?

17 THE WITNESS: That is right.

18 Q Do I understand the corporation did not have  
19 income to that, that it didn't pay dividends?

20 A No, I have the corporate income statement here  
21 and you will see it.

22 THE COURT: Yes, okay.

23 Q That is 1972?

24 A That is 1972.

25 THE COURT: The same figures for 1973, if you have

1 jqd

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2 them.

3 THE WITNESS: Surely. 1973, my corporate  
4 income was 55,996.

5 THE COURT: How much of that went to you?

6 THE WITNESS: Of that I took 19,000 -- is that  
7 all -- 19,500.

8 THE COURT: And back to your personal returns.

9 Adjusted gross income for 1973, personal, was  
10 21,450 including the 19,500.

11 THE WITNESS: That is right.

12 Q The figures then generally are between 20 and  
13 25,000 each year and that fairly represents what you took  
14 home?15 A It's more complicated than that. I have answered  
16 what you asked me, not what you just said.17 Q Let me ask it this way: what I want to know is  
18 just -- you may have had other cash in your pillow. I am not  
19 concerned with anything but earnings.20 I don't think there is any other objective method  
21 of dealing with the subject we are dealing with than is  
22 better than the concept of adjusted gross income or taxable  
23 income because he may have given a lot of money to charity  
24 or something like that. I have told Dr. Stern that I am not  
25 interested in whether he had money under his pillow that he

1 jqd

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2 used or whether he sold something at a profit or anything  
3 like that.

4 For the purposes of mitigation of damages I  
5 don't consider those items relevant.

6 One further question which I think has been  
7 answered. You have a corporate figure and from that you have  
8 an individual figure. The question I was going to ask is  
9 was there any accruals of cash profits from the corporation  
10 which came as a result of his own services, and I think you  
11 said no.

12 A That is right.

13 MR. SIMON: No further questions, your Honor.

14 CROSS-EXAMINATION

15 BY MR. HELLERSTEIN:

16 Q Dr. Stern, at the beginning of your examination  
17 Judge Lasker and Mr. Simon both asked you some questions  
18 about the schedule of incremental annual revenue and  
19 incremental annual expenses, the last page of Exhibit C and  
20 of Exhibit D.

21 A Yes.

22 Q There were other questions that were directed to  
23 the language of retainer written by Mr. Oztemel at the foot  
24 of that schedule.

25 A I don't have that here now.

2 THE COURT: I do.

3 THE WITNESS: Okay.

4 Q When you and Mr. Mott and Mr. Hermann had your  
5 first conversations with the schedule, would you place that  
6 time period?

7 A Yes, after Mr. Oztemel and I had reached the  
8 agreement of the August 25 document and I was back in the  
9 Satra offices. It happened either very late on August 30  
10 or in the morning of August 31 and the discussion was --

11 Q Let's not get into discussions. It was between  
12 Exhibit B and Exhibit C?

13 A Yes.

14 Q When you had that first discussion was there any  
15 discussion of retainer compensation viza-viz commission  
16 compensation?

17 A No, that was applicable only to that earnings  
18 document. There was no such thing.

19 Q There was no discussion?

20 A That is right.

21 Q Was there any discussion as to what types, if  
22 any, of expenses would be governed by the schedule?

23 A No.

24 Q You have testified, and I don't want to ask you  
25 to repeat your testimony, as to what Mr. Hermann said and

2 what you said, what Mr. Mott said at the period of time.

3 I want to clear up this particular point: did  
4 anyone discuss anything about categories of expenses or types  
5 of expenses that were or were not to be governed by the  
6 schedule?

7 A No.

8 Q Was it the case that this schedule merely set  
9 forth under what circumstances expenses could be deducted?

10 MR. SIMON: I object to that question as being  
11 leading, your Honor.

12 MR. HELLERSTEIN: It is leading, your Honor. I  
13 am trying to clarify a point. I think the point may be over-  
14 clarified.

15 THE COURT: I will allow it.

16 (Question read.)

17 A I don't really understand it.

18 Q It's a bad question.

19 I think the point is well clear.

20 THE COURT: All right.

21 Q Later on you testified you had the discussion  
22 with Mr. Oztemel that directly led to the writing of this  
23 language, "In alternate one any retainers received would be  
24 divided 50-50, other income as above schedule."

25 When you had that discussion did you and

1 jqd

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2 Mr. Oztemel discuss whether some types of expenses would be  
3 covered by the schedule and other types of expenses would not  
4 be covered by the schedule? In other words, was your  
5 discussion involving categories of expenses?

6 A No.

7 Q What was your discussion, one more time, with  
8 Mr. Oztemel?

9 A The discussion -- let me clear it up.

10 The origination of the expense schedule was  
11 relative to the earlier document where I received a salary.  
12 Here are the final documents, one alternative, the second  
13 one, I still received the salary and apparently the philosophy  
14 of that expense schedule would hold, no categorization or  
15 anything like that.

16 Under alternative one, where I would not receive  
17 a salary, the only discussion we had was that for me to get  
18 some kind of current income in lieu of salary I had to not  
19 have this expense schedule applicable to current income.  
20 That is all we discussed. But in arriving at the rationale  
21 for it and Mr. Oztemel rationalized after all that makes a  
22 lot of sense since --

23 MR. SIMON: We object to what Mr. Oztemel  
24 rationalized unless he said it.

25 THE COURT: He said it, is that it?

2 THE WITNESS: Yes. It was perfectly reasonable  
3 not to have the expense schedule applicable to retainers or  
4 things like that because really these were expenses to be  
5 incurred on the barters and financings with the sales which  
6 were really the future income.

324 7 Q Did you care how Mr. Oztemel or Satra accounted  
8 for its expenses?

9 A No.

10 Q Did you care as a joint venturer with Satra in  
11 what way Satra set up its books to cover its expenses?

12 A No.

13 Q Was it the purpose of this schedule to alleviate  
14 that concern?

15 A Yes.

16 MR. SIMON: If he is asking for Dr. Stern's  
17 understanding of what the purpose of the schedule was, which  
18 we certainly agree is germane to the issue before the Court,  
19 I think that ought to be clarified.

20 If he is asking whether the purpose, as it were,  
21 came from our mouths, then I would like to know from who and  
22 when.

23 THE COURT: Is your question whether it was  
24 Dr. Stern's understanding?

25 MR. HELLERSTEIN: Yes, I asked for your under-

2 standing.

3                   Was it your understanding that the purpose of  
4 the schedule was to make it unnecessary for you to have a  
5 concern as to whether or not Satra actually incurred expenses?

6                   MR. SIMON: I might object and ask why it is that  
7 Dr. Stern's understandings are admissible now when they  
8 weren't before?

9                   THE COURT: I don't think they were admissible  
10 on the other basis. I admit your testimony and his testimony.

11                   MR. HELLERSTEIN: That is exactly right.

12                   MR. SIMON: We object to Dr. Stern's under-  
13 standings unless the Court is willing to consider them all.

14                   THE COURT: I don't intend to apply any standard  
15 and I assume it's offered in that form and it's accepted  
16 when offered in that form.

17                   Q        During the trial and afterwards, I think today  
18 also, you testified about a conversation that you had at this  
19 time when this schedule came to be created with Mr. Mott and  
20 Mr. Hermann in which the subject of actual versus scheduled  
21 expenses came up.

22                   A        That is correct.

23                   Q        Please state one more time what that conversation  
24 was.

25                   A        Mr. Mott and Mr. Hermann came in and said that

2 they were represting the executive committee and they wanted  
3 to discuss with me modifications of the agreement that I had  
4 reached with Mr. Oztemel relative to the August 25 agreement.

5 They said that after all they would have expenses  
6 in servicing clients and those should be reimbursed.

7 I said, "If you want to be reimbursed for actual  
8 expenses I would have to audit the books. Is that what you  
9 are asking?" and they said "No." They said, "In lieu of  
10 we want to get an agreement now of an expense reimbursement  
11 schedule which would be a function of revenues rather than  
12 actuals."

13 MR. HELLERSTEIN: No further questions.

14 REDIRECT EXAMINATION

15 BY MR. SIMON:

16 Q When you talked to Hanno Mott and Bill Hermann  
17 on the issue of the expense schedule, did they tell you that  
18 their expenses would be of a financial nature as opposed to  
19 an administrative nature?

20 A No, they just said expenses. They said "After  
21 all, you know, we will have expenses."

22 Q And you did know they would have expenses, did  
23 you not?

24 A I knew them to be whittling me down relative to  
25 an agreement I had arrived at.

1 jqd

Stern-redirect

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2 THE COURT: I take judicial notice of the fact  
3 that any sane businessman -- and I will assume for the  
4 purposes of this discussion that Mr. Stern was and is sane--  
5 knows that expenses are incurred in the course of a business  
6 venture. Yes?

7 THE WITNESS: That is right.

8 Q The answer is yes?

9 A Yes.

10 Q And there was no discussion at all as to what  
11 kinds of expenses, whether they be financial expenses or  
12 administrative, that is correct, is it not?

13 A That is correct.

14 Q And you didn't care so long as the figure of  
15 100,000, which was substituted, was applied in accordance  
16 with what your agreement was?

17 MR. HELLERSTEIN: Objection. The question is  
18 argumentative.

19 THE COURT: We don't need to have him say it if  
20 he testified to that.

21 MR. SIMON: It's my understanding of his testimony  
22 that he said he didn't care.

23 THE COURT: That is my understanding too.

24 Q Where, if ever, did you discuss with anyone from  
25 Satra any distinction between financial expenses and

1 jqd

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2 administrative expenses?

3 THE COURT: Did you ever have such a discussion?

4 THE WITNESS: I discussed with Mr. Oztemel the  
5 difference between the expenses associated with financing  
6 and barters as distinct from current income.

7 Q When did you have that discussion?

8 A At 7:00 p.m. of August 15 at his office.

9 Q Dr. Stern --

10 THE COURT: Before he wrote the material on this  
11 Schedule C of Exhibit C-D?

12 THE WITNESS: That is right.

13 Q Did you discuss it within the context of that  
14 schedule as if it had been set forth by Hanno Mott? Was it  
15 a general discussion or did it apply to the schedule?

16 A It says here --

17 Q That is not my question.

18 A Yes, we had such a discussion.

19 Q And it applied to the schedule?

20 A Yes.

21 Q Dr. Stern, I submit to you that you previously  
22 testified that you absolutely had no discussions with  
23 Mr. Oztemel about that schedule in that evening meeting, is  
24 that not a fact?

25 MR. HELLERSTEIN: This may be the style of

1 jqd

Stern-redirect

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2 questioning at Ft. Worth, but Mr. Simon is not here to  
3 testify.

4 MR. HILL: I object to that. Mr. Simon is a  
5 guest in this court and Mr. Hellerstein knows better than to  
6 make such a comment.

7 MR. SIMON: My feelings are not hurt.

8 THE COURT: It's not a question of Mr. Simon  
9 testifying. He has a right to ask his questions. Whether  
10 I term Mr. Stern hostile -- well, can you refer to what you  
11 are referring to?

12 MR. SIMON: Page 282 of the transcript.

13 THE COURT: Let's look at it and if there is an  
14 inconsistency we can bring it out.

15 MR. SIMON: 282 or 382.

16 MR. HILL: This was in the testimony read to the  
17 jury, your Honor, I believe.

18 THE COURT: Is this pretty near the end of your  
19 questioning?

20 MR. SIMON: It is the end.

21 THE COURT: I will take five minutes in the  
22 robing room and you can call me when you are ready.

23 (Recess.)

24 MR. SIMON: If the Court please, Mr. Hellerstein  
25 tells me that we are not arguing about impeachment and we

2 will clear up this point and we will be through.

3 Q Dr. Stern, the testimony that I was concerned  
4 with is the testimony which you gave at page 332 of the  
5 transcript and it refers -- and you have had a chance to  
6 look at it -- to this expense schedule.

7 Your words were, and I will read it quickly,  
8 beginning at the bottom of 331, line 21, which was your  
9 question. We have been over this before.

10 The Court asked this question:

11 "Q In addition to that, as Mr. Hill I thought  
12 had just brought out, you and Mr. Mott and maybe some others  
13 also discussed the question of expense reimbursement on  
14 August 21 and, in particular, the schedule that was  
15 attached," and your answer at that time, Dr. Stern, was,  
16 "We discussed it in the morning of the 31st applicable to  
17 the earlier agreement. It happens that added it to the 31st  
18 agreement. There was no discussion at that time of them  
19 having added it to the 31st agreement."

20 THE WITNESS: That is right.

21 Q And that is correct?

22 A Absolutely.

23 MR. SIMON: Nothing further.

24 (Continued on page 154.)

25

1 jqd

Stern-recross

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xvx 2 RECROSS EXAMINATION

3 BY MR. HELLERSTEIN:

4 Q When Mr. Simon was asking you questions about the  
5 payments that were made under the December 1973 agreement  
6 he asked you a question whether the expense reimbursement  
7 schedule was applicable to the monthly sums of \$16,667 and  
8 he asked you a question of whether the expense reimbursement  
9 schedule was applicable to the monthly advances of \$9,350.

10 At that time he wanted to offer you a reason why  
11 it was not applicable and Mr. Simon asked you the questions.

12 I now ask you the question.

13 A I will offer the reason as it relates to a dis-  
14 cussion I had with Mr. Schloss.

325 15 MR. SIMON: Same objection, and I assume the  
16 same rulings. He is going to talk about a way of reasoning.

17 THE WITNESS: I am going to talk --

18 THE COURT: I will allow him to explain the  
19 basis of his answer. It involves a discussion.

20 THE WITNESS: It involves a specific discussion.  
21 It has to do with the discount, the present value of future  
22 moneys. I did discuss this with Mr. Schloss and I am sure  
23 it's in the transcript.

24 THE COURT: You are not saying that you discussed  
25 any items relating to the 1973 agreement.

2 THE WITNESS: No, sir, but I discussed the mean-  
3 ing of the current versus the future earnings, of the fact  
4 that you don't add them up or you don't compare them on a  
5 one-to-one ratio. The reasoning is as simple --

6 Q Say what you said to Mr. Schloss and say what  
7 Mr. Schloss said to you, and if you can fix the time.

8 A Absolutely.

9 It was before I went to lunch for what I thought  
10 was to be a critical negotiation with Mr. Stafford on  
11 September 8.

12 I asked Mr. Oztemel if he had any guidance for  
13 my negotiations. His response was no, he thought I would be  
14 in the best position to judge. I then thought that  
15 Mr. Oztemel is a rather proud man and may not be willing --

16 Q Say what you said to Mr. Schloss.

17 A I then went to Mr. Schloss and I explained to  
18 him that I was going to negotiate with two elements, one as  
19 a retainer and one a commission. I would like some guidance  
20 where I should put the maximum effort.

21 I then went on to tell him the following: one  
22 can do a simple theoretical calculation on the discounted  
23 present value of future moneys. So that you are able to  
24 relate current as compared to future income. For instance,  
25 the banks now, let us say, give you ten percent interest.

1 jqd

Stern-recross

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2 MR. SIMON: It's late in the day, but if this  
3 has any relevance to anything, I don't know where.

4 THE COURT: I must say, I don't find it very  
5 helpful.

6 MR. HELLERSTEIN: Nothing further.

7 THE COURT: Thank you, Mr. Stern.

8 (Witness excused.)

9 THE COURT: Am I to understand there is another  
10 witness?

11 MR. HILL: Yes, your Honor, I want to put  
12 Mr. Oztemel on.

13 A R A O Z T E M E L, called as a witness on behalf of the  
14 defendants, having previously been sworn, resumed and  
15 testified further as follows:

16 DIRECT EXAMINATION

17 BY MR. HILL:

18 Q Subsequent to 1971, Mr. Oztemel, you advised  
19 Mr. Stern with respect to your arrangements and obligations  
20 with him. Did you ever have a discussion with Dr. Stern  
21 about the prospect of entering into a new agreement with  
22 IBM?

23 A Yes.

24 Q Do you recall when that conversation was more  
25 or less?

1 jqd

Oztemel-direct

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2 A The specific date, no, I do not recall.

3 Q Was it before the 1973 agreement was executed?

4 A It was some time during, I believe, the latter  
5 part of 1972.6 Q Could you tell us what that discussion was, what  
7 you said to him and what he said to you?8 A Well, the discussion was arranged by, I think,  
9 the respective attorneys at the offices of Dr. Stern's  
10 attorneys. We met alone and the discussion generally was  
11 to see if we could find a means of settlement. I told  
12 Dr. Stern that --13 MR. HELLERSTEIN: It seems to me the discussions  
14 and settlement are privileged.

15 THE COURT: They normally are, yes.

16 MR. HILL: Not between the parties in the absence  
17 of counsel. Moreover, there has been a charge here at least  
18 two or three occasions this morning, I believe, that we  
19 entered into this new agreement without discussing it with  
20 Dr. Stern and somehow we were doing bad things to Dr. Stern  
21 when we entered into this agreement.22 I will elicit testimony from this witness that he  
23 did discuss it with Dr. Stern. He discussed the reasons for  
24 it, and moreover, I should also point out, for the record,  
25 that there were several full-blown proceedings before this

1 jqd

Oztemel-direct

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2 Court on the question of the new agreement and what was  
3 supposed to be done and what wasn't supposed to be done.

4 THE COURT: There is a difference between two  
5 possible positions. One is that the negotiations occurred  
6 without Dr. Stern knowing anything about the fact that they  
7 were occurring.

8 The other is that he took no part in them.

9 Mr. Hellerstein, I would like to ask you whether  
10 you are trying to put before the Court the fact that  
11 Dr. Stern simply didn't know that any proceedings were going  
12 on or, rather, that he didn't take any part in them.

13 If it's the latter, then this testimony isn't  
14 necessary.

15 MR. HELLERSTEIN: I will let Mr. Fisher answer  
16 that.

17 MR. FISHER: Several months prior to the actual  
18 transaction, the new agreement --

19 THE COURT: In December 1973?

20 MR. FISHER: I think Mr. Paterson advised us that  
21 it was then under negotiation, but we were not any party to  
22 the negotiations.

23 THE WITNESS: That is not what I was referring to.  
24 The conversation took place between myself and Dr. Stern and  
25 I specifically advised Dr. Stern of a new agreement. I asked

1 jqd

Oztemel-direct

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2 his opinion. I told him what our problems were and we then--  
3 then I tried to find a solution with him.

4 Dr. Stern knew very well what the underlying  
5 reasons were and what we were about to do.

6 THE COURT: I am not sure this is relevant  
7 here because I have indicated that my instinctive reaction  
8 is that the question of good faith or bad faith is really not  
9 at issue. The question is whether there was a renewal of the  
10 contract and, if so, he is entitled to certain benefits.  
11 If not, he is not entitled to certain benefits.

12 I don't blame Mr. Oztemel or Mr. Hill for wishing  
13 to remove any implication of deceptive behavior. For that  
14 purpose I am glad to have heard what you have to say.

15 MR. HILL: That is the only reason it's offered.

16 THE COURT: All right.

17 Q Mr. Oztemel, you heard Mr. Stern testify here  
18 with respect to a meeting which he had with you at 7:00  
19 o'clock in the evening on August 31 when the now famous  
20 Plaintiff's Exhibit C was signed by you.

21 Did you have any discussion with Dr. Stern about  
22 the types of expenses that were covered by the exhibit to  
23 Plaintiffs' Exhibit C, the August 31 document?

24 A We had quite a deal -- we had many conversations--

25 THE COURT: This evening.

1 jqd

Oztemel-direct

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2 Q What about in the evening of the 31st?

3 A I mean precisely that, Mr. Hill. There was just  
4 long conversations, first with me, then this agreement.  
5 Mr. Schloss would try to convince him and then with  
6 Mr. Mott and whoever else was there, we were trying to con-  
7 vince Dr. Stern that there are such things as expenses and,  
8 with all due respects, there are some people who do not  
9 understand or accept that business operates with expenses.10 Q Did you discuss the kinds of expenses involved  
11 in this transaction?12 A We did not discuss categories of expenses but  
13 we specifically did discuss -- I personally specifically  
14 discussed with Dr. Stern the magnitude of expenses as they  
15 were outlined to us by IBM because IBM had already warned us  
16 that we must expect substantial expenses because of the  
17 number of people expected to work with us in Moscow. So we  
18 certainly discussed those. But we did not categorize as to  
19 where they fell.20 Q Did you discuss amounts? Was reference made to  
21 amounts?22 A We tried to arrive at amounts and I think we  
23 clearly arrived, with Dr. Stern's final agreement after many  
24 hours, that \$100,000 minimum, even though no sales were made,  
25 would not be an unreasonable amount of money we were expecting

1 jqd

Oztemel-direct

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2 to spend. We are not entirely happy because I think we are  
3 looking for more, but we settled on that.

B26

4 Q Let me take you now to the now unfortunately  
5 erased schedule that was up here.

6 Did that schedule, as put on the blackboard and  
7 as copied into a document which is now an exhibit, your  
8 Honor, which I believe is quadruple E --

9 THE COURT: I never found out what the exhibits  
10 are in between, but there must be others.

11 Q I think I will put these in front of you and  
12 his Honor can sort of look over his shoulder.

13 Mr. Oztemel, does that chart reflect your under-  
14 standing as of August 31 with respect to how the expense  
15 schedule was supposed to work?

16 A Clearly not.

17 Q Would you explain why it doesn't?

18 A Because whether erroneously or purposely, I don't  
19 know. But my understanding, and it was Dr. Stern's under-  
20 standing then, that at zero income, even our expense deduction  
21 would have been \$100,000. That 100,000 belongs here and the  
22 200 belongs there and the curve indeed goes in that fashion.

23 Q So I am clear on this, it was your understanding  
24 that in August of 1971, in any event, there was going to be  
25 100,000 and the schedule in terms of offsets against income

1 jqd Oztemel-direct/cross 162

2 just didn't apply until you got to \$100,000?

3 A That is correct. We had clearly understood, all  
4 of us after many hours, that if there were no income, and  
5 we expected that there would not be income from IBM perhaps  
6 for some time, that our minimum expenses nevertheless would  
7 be \$100,000 comprised of travel expenses, interpreters,  
8 etc., etc.

9 Q So that at the risk of repetition, the curve  
10 that appears on that chart really should start not at zero  
11 but at \$100,000?

12 A That is correct.

13 MR. HILL: No further questions.

14 CROSS-EXAMINATION

15 BY MR. HELLERSTEIN:

16 Q Mr. Oztemel, do you recall testifying at page 638  
17 of the transcript in answer to Mr. Hill's questions as  
18 follows:

19 "Q And how did you tie it -- that is, the  
20 schedule of expenses -- to the schedule?

21 "A By starting from point zero, which was  
22 100,000, point zero income, 100,000 and then going from there.  
23 But at some point we agreed that at some point the profits  
24 then would not justify further extension of expenses."

25 Do you recall so testifying?

2 A They are identical as far as I understand what  
3 I said, and as far as I think what I said now. They are  
4 identical. In other words, that 100,000 starts from zero  
5 level where the zero is.

6 Q The question is whether you recall giving such  
7 testimony?

8 A I don't, but I am sure it's so.

9 Q If we would have a column, income, and another  
10 column of expenses, you would relate the columns as follows--

11 MR. SIMON: We rise again to point out on the  
12 record that this is the same type of examination the Court  
13 has held may or may not be material. I am perfectly willing  
14 to concede it may be material on both sides to the Court but  
15 I want to protect the record.

16 THE COURT: Whatever ruling I make will be  
17 uniform as to both witnesses and no matter who answers the  
18 question.

19 MR. HELLERSTEIN: I am also testing credibility,  
20 your Honor.

21 Q Is that correct, zero income, \$100,000 of expenses?

22 A If I were doing it I would say zero to \$25,000,  
23 \$100,000 expenses. I would not do it in that way. You have  
24 to start interpolating which is precisely not the under-  
25 standing.

2 MR. HILL: If I may make a suggestion that  
3 Dr. Stern put his chart on. Maybe the thing to do is to  
4 let Mr. Oztemel put his chart up.

5 THE COURT: I am perfectly willing to do that.  
6 I find it difficult in understanding what his theory is.  
7 Whether it's right or wrong, I know it's different from  
8 Dr. Stern's. It's an understandable point of view.

9 Up to \$25,000 worth of income you were entitled  
10 to deduct \$100,000 worth of expenses?

11 THE WITNESS: That is right. From there until  
12 we reached 250,000 we were not entitled to deduct anything  
13 else. From then on we started again, according to that  
14 schedule.

15 Q Let's suppose you have \$260,000 of income, how  
16 much expenses could be applied?

17 A I don't know. If you drew this graph or this  
18 thing to scale, I think we would have no problem in finding  
19 exactly what it would be.

20 Q Maybe you can look at page 3 of Exhibit D.

21 A Yes.

22 Q How much expenses would be applied against  
23 \$260,000 of income?

24 THE COURT: You really mean against the extra  
25 260,000 against the 250,000?

2 A My understanding would be, and was still then,  
3 that for the next \$250,000 we were allowed \$50,000 extra.

4 You said what?

5 Q You have \$260,000 of income.

6 A You have \$10,000 more. 10,000 is about .4 or 5.  
7 I think that would be about \$2,000, I believe.

8 Q \$102,000 as expenses?

9 A That is right.

10 Q You have taken what percent against the 10,000?

11 A I believe either .4 or 4 percent, whatever.

12 Q But you wouldn't take a percentage against the  
13 first \$250,000?

14 THE COURT: Four percent of \$10,000 would be  
15 \$400, not \$2,000.

16 THE WITNESS: You are right.

17 Q It's 20 percent, isn't it?

18 A 10,000 by 250,000.

19 THE COURT: Are you saying, so I get your theory,  
20 that you would apply the same ratio as there is in the  
21 second column here or second line of the two columns, that is  
22 the ratio?

23 THE WITNESS: That is right.

24 Q That is a ratio of 20 percent?

25 A Yes.

2 Q In other words, \$102,000?

3 THE COURT: Right.

4 Q I notice that for the progression or for the  
5 increment between \$250,000 and \$500,000 of revenue you apply  
6 a percentage, a constant percentage of 20 percent against  
7 each dollar of revenue, is that correct?

8 A I don't follow you.

9 Q I will put the question again.

10 Starting with revenue of \$251,000 in the year  
11 and continuing until revenue of \$500,000 in a year, is it  
12 your testimony that from each dollar of revenue 20 percent is  
13 to be deducted for expenses?

14 A If arithmetically that is how they add up, that  
15 is my understanding.

16 Q But for the first \$250,000 is it your testimony  
17 that \$100,000 applies for each dollar of expense?

18 A No. It's just that the 100,000 was understood  
19 to be the minimum expenses at zero level, but did not increase  
20 until we passed \$250,000.

21 THE COURT: Let me ask you, suppose in the first  
22 year there had been revenue of \$50,000. Is it your position  
23 that the agreement was that you are entitled to full  
24 \$100,000 credit against that \$250,000?

25 THE WITNESS: That is right.

2 THE COURT: What Mr. Hellerstein is trying to  
3 bring out is that you have applied the full amount in the  
4 first 250,000 but when you came to discussing the second  
5 area of another \$250,000, you pro-rated the equivalent  
6 incremental.

7 THE WITNESS: Precisely.

27 8 THE COURT: Why not pro-rate in the first  
9 instance?

10 THE WITNESS: We had come to an understanding  
11 that even if there were no revenues we would have a minimal  
12 of \$100,000 in expenses?

13 THE COURT: That applied only to the first 100,  
14 is that right?

15 THE WITNESS: It's the first 250.

16 THE COURT: Of expenses?

17 THE WITNESS: Of income.

18 THE COURT: All right, or to the first 100,000.

19 THE WITNESS: Yes.

20 THE COURT: All right.

21 Q When you made this agreement with Dr. Stern,  
22 Mr. Oztemel, you had no agreement with IBM in hand, is that  
23 correct?

24 A That is correct.

25 Q It was entirely possible, was it not, that an

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2 agreement with IBM could have called for income of \$100,000  
3 a year for 20 years?

4 A I think if I remember correctly, Mr. Hellerstein,  
5 it was not the thinking of anybody at that time that that  
6 could happen, those of us that thought very astronomical  
7 figures. There were those like Schloss who were pessimistic.  
8 Nobody assumed there would be an even number like \$100,000.

9 Q If it happened that you got the contract for  
10 IBM calling for payments by IBM to Satra of \$100,000 a year  
11 spreading over 20 years, under your understanding of this  
12 agreement, as you testified, Dr. Stern would have got  
13 nothing, is that correct?

14 A Certainly that wasn't the intent. Precisely  
15 that is why, as Dr. Stern told you himself, I asked him what  
16 best to judge what to negotiate with IBM so he was not in  
17 that position. Also that was the reason I agreed to give  
18 Dr. Stern the benefit of 50 percent of retainers.

19 Q So if the \$100,000 was to be paid each year for  
20 20 years as a retainer, Dr. Stern would have gotten exactly  
21 half, \$50,000 without deduction, under your understanding?

22 A If the transaction would have been -- and  
23 certainly it would not have been accepted as a contract by  
24 us in those exact terms -- under the hypothetical example,  
25 yes, but that would not be acceptable to us or Dr. Stern.

2 Q One last question.

3                   Would you point out for the Court where in  
4 Exhibit C there is any language to support your understanding  
5 that the first \$250,000 of incremental annual revenue would  
6 be subject to \$100,000 of expense and the second \$250,000  
7 of incremental annual revenue would be subject only to a  
8 pro-rata expense?

9                   A Specifically, Mr. Hellerstein, in the schedule--  
10 whatever that is, the schedule attached to the thing, as  
11 you note purposely we didn't go zero to 250 and then 250 to  
12 300 and 300 to 325. We just put the numbers because the  
13 understanding I thought was clear with Dr. Stern.

14                   Q I take it you read this carefully when it was  
15 put before you, you initialled it, you so testified?

16                   A Carefully. There was not much about it.

17                   Q Sufficiently careful to initial each page,  
18 Mr. Oztemel?

19                   THE COURT: I will state that neither of the  
20 parties read the documents sufficiently carefully.

21                   Q The question I put to you, Mr. Oztemel, is if  
22 you can point out to the Court any language in this document  
23 that supports --

24                   THE COURT: I don't think there is any guessing  
25 game. If you are talking about this page it clearly does not

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2 talk in terms of pro-rata and I don't think Mr. Oztemel says  
3 so.

4 THE WITNESS: No, I don't.

xvx 5 (Plaintiff's Exhibit HHHH was marked for  
6 identification.)7 Q I show you quadruple H for identification,  
8 Mr. Oztemel, and ask if you sent that letter on or about  
9 June 26, 1973 to IBM World Trade Corporation?10 A Yes, I remember the letter without having read  
11 the whole thing. Yes, I do.

12 MR. HELLERSTEIN: I offer it in evidence.

13 MR. HILL: No objection.

14 THE COURT: Received.

xvx 15 (Plaintiff's Exhibit HHHH was received in  
16 evidence.)17 MR. HELLERSTEIN: I draw your Honor's attention  
18 to the first sentence where Mr. Oztemel states, "We refer  
19 to your proposed contract dated May 31, 1973 to replace the  
20 existing contract between our firms."21 THE COURT: I understand why you draw that to my  
22 attention. I assume Mr. Hill's comments there is that the  
23 words "renew" and "replace" are not necessarily equal in the  
24 law.

25 MR. HILL: I think that is clear enough.

2 THE COURT: I wish it were clear.

3 Mr. Oztemel, you are excused.

4 Are you concluded?

5 MR. HILL: Yes.

6 (Witness excused.)

7 THE COURT: Where do we go from here?

8 MR. HILL: I am somewhat disturbed by a comment  
9 your Honor made during the course of today's proceeding that  
10 what had been presented to your Honor was not really what  
11 your Honor had expected to have presented. As far as we are  
12 concerned, we are satisfied that we presented what needed to  
13 be presented.

14 THE COURT: You have been working at the case  
15 for the last week and I haven't. Let me answer you, since  
16 you said that.

17 First of all, we did get later material which is  
18 what I did expect to hear something about. Secondly, it may  
19 be that a good deal of this is much more mathematically  
20 demonstrable on paper than I had assumed. But normally when  
21 you hold a trial for damages there is a certain amount of  
22 testimony about damage and there wasn't really any today and  
23 I guess that is because this is a mathematical computation,  
24 either according to formula A or B or not at all.

25 MR. HILL: This is what we thought we had in the

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2 exhibits.

3 THE COURT: I believe they are. It hadn't  
4 occurred to me so much.5 I still want to ask the question how we are  
6 going to wrap this up. I think I must call on your gentlemen,  
7 and you probably thought I would, to submit findings of fact  
8 and conclusions of law on the material before me at this  
9 time. I am wondering how we should do this.10 I suppose each of you ought to submit, insofar  
11 as we are talking about actual money computations, a  
12 computation as to how much would be owed Dr. Stern in the  
13 event that the 1973 contract does not constitute a renewal  
14 and how much he is owed in the event that it is a renewal.15 In addition, you have raised the further question  
16 which I guess is a matter of law and not a fact, but has to  
17 be dealt with somehow or another, as to whether even if the  
18 1973 contract is a renewal, this contingent liability clause  
19 affects Dr. Stern and, if so, how?

20 Am I not correct that you raised that question?

21 MR. HILL: Sure, your Honor. We also raised the  
22 question, since he now testified that he wasn't responsible  
23 for any expenses at all, we also raised the question, and  
24 it's clearly in the case, as to whether or not the expense  
25 schedule, if you like, applies to the \$16,000 monthly payment

2 as well as this advance.

3 THE COURT: That will be part of your computation.

4 MR. HILL: Sure.

5 THE COURT: What do you propose about what  
6 papers are to be submitted from here on and what timing?

7 MR. HILL: Speaking for the defendants, your  
8 Honor, I suppose that one of the things we need to do is  
9 examine this memo that was submitted this morning which I  
10 just haven't had a chance to do. I would suppose that we  
11 would submit proposed findings and conclusions of law on the  
12 subject of damages. I would suppose also that as to this  
13 question of renewal we would file some sort of a memorandum  
14 of law.

15 THE COURT: All right.

328 16 MR. HILL: I would suppose that on the question  
17 of the scope or the import of the jury verdict we will want  
18 to address ourselves to that and I guess that would be in  
19 part responsive as to the position taken by the plaintiff as  
20 to what they decided. Your Honor has expressed some --

21 THE COURT: Reactions.

22 MR. HILL: Some concern as to what they did  
23 decide, as to whether what is in this case and what is out  
24 of it in this proceeding.

25 THE COURT: I really don't think, despite the

2 fact that we split this in two pieces, that we are faced with  
3 anything other than we would be if we were at the end of a  
4 regular non-jury trial with the exception that it happens  
5 that the plaintiff has submitted a document which covers some  
6 of the material we are talking about but which may not cover  
7 it all. I doubt it does.

8 It doesn't include proposed findings, for example.

9 MR. HELLERSTEIN: No.

10 THE COURT: So I would ask Mr. Hellerstein to  
11 submit a memorandum on any points he hasn't covered in this  
12 and you submit a memorandum on all the points that are to be  
13 covered, and each of you also to submit proposed findings  
14 of fact and conclusions of law. I do not want to put you  
15 onto any more work than is necessary, so I would hope if  
16 those were submitted --

17 MR. HELLERSTEIN: Before your Honor sets a date,  
18 I wonder if I can make one more point. The Satra  
19 Corporation subsidiary's financial statement as of July 31,  
20 1973 came to my attention yesterday. It does not show a  
21 healthy financial situation. It shows, in fact, a deficit  
22 and I am very much concerned --

23 THE COURT: In net worth, you mean?

24 MR. HELLERSTEIN: Yes, your Honor. I am very  
25 much concerned that any judgment we are possibly eligible to

2 obtain might be in jeopardy. I would, therefore, ask for  
3 whatever consideration that your Honor could give us in terms  
4 of early dates.

5 MR. HILL: I must say, wholly apart from the  
6 impropriety of this argument, I haven't had a chance to look  
7 at this statement but I suppose I can point out that they  
8 have unrestricted cash of \$7,000,000, accounts receivable of  
9 seven and a half million, and inventory of two million four.  
10 I don't really know what the bearing of what appears to me  
11 to be a deficit of \$1,000,000 has. I really don't.

12 THE COURT: I can't comment on anything as  
13 elaborate as this statement from the bench, it having been  
14 thrown at me right now. I won't try to. I will say that  
15 Mr. Hellerstein is entitled to move for any protection he  
16 feels. If he feels it's appropriate, that is. Until that  
17 time I am not really going to speed things up.

18 I don't think we ought to let this matter slide,  
19 in any event. I was going to suggest that these papers, it  
20 seems to me, could be submitted within two weeks and if  
21 Mr. Hellerstein concludes before the end of the two weeks  
22 that something extraordinary is required, I would give it  
23 earlier attention and decision than I would otherwise.

24 Otherwise, I will give it its appropriate place.  
25 Is there any problem involved in that schedule?

2 MR. HILL: Yes, I guess I do. I say this for  
3 several reasons. I have to go abroad on matters of a client,  
4 your Honor. Two, they are the plaintiffs, and it seems to  
5 me that this business of exchanging findings at the end of  
6 a two-week period, I hate to use the word because it's  
7 overused, but it's counterproductive.

8 They put in a set of findings and we sit down  
9 and put in a set of findings at the same time. They are  
10 really not going to be at issue.

11 THE COURT: That is the question I wanted to  
12 ask. I was going to ask this. I do think it's appropriate  
13 for the plaintiffs to submit their findings first except on  
14 the question of mitigation, of course.

15 MR. HILL: I understand.

16 THE COURT: Then I think that the findings to  
17 be submitted by the defendants thereafter should indicate  
18 those findings of the plaintiff that they agree with and  
19 simply propose any other findings they don't agree with.

20 MR. HILL: The same thing is true with the  
21 memorandum of law except for mitigation. We can say that  
22 it's responsive. It's not sort of semi-parallel.

23 THE COURT: Let's do it this way: because you  
24 have the burden on mitigation, if two weeks is too hard  
25 subject to Mr. Hellerstein's right to move this case, let's

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2 talk in terms of three weeks for the following: Mr. Hill,  
3 or the defendants, will submit to plaintiff proposed findings  
4 of fact and conclusions of law on the question of mitigation  
5 and the plaintiffs will submit to the defendants proposed  
6 findings of fact and conclusions of law on other issues,  
7 and within ten days thereafter, counterfindings are to be  
8 submitted on each other.

9 That leaves the question of memoranda up in the  
10 air, but I really don't see why we have to -- well, submit  
11 memoranda on the same points at the same time.

12 MR. HILL: I was going to say if they have  
13 memoranda to submit in support of conclusions of law we  
14 ought to get those memoranda at the same time.

15 MR. HELLERSTEIN: Our memoranda we put in today  
16 would satisfy what you want to do.

17 THE COURT: If it's sufficient in your mind,  
18 that is all right with me. I just want to tell you that you  
19 are free to add anything you want to.

20 Thank you, gentlemen. In spite of the somewhat  
21 confusion it's been very interesting and I hope I can unsnarl  
22 it fairly.

23 \* \* \* \* \*

